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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL HANNING LORIZ
and CARA FRANCKE LORIZ,

Petitioners,

v.

JOHN B. CONNAUGHTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An American family forced to flee its residential property to avoid court-recognized threats from state-licensed, commercial shooting activities, which manifest a private use, physical invasion taking, raises the following questions of national importance:

1. Whether the Public Use and Due Process clauses of the Fifth Amendment offer meaningful protections from impermissible, uncompensated takings.

2. Whether federal courts continue to improperly expand the jurisdictional bar of 28 U.S.C. §1257 contrary to this Court's authority and beyond the full scrutiny of the judiciary.

3. Whether 28 U.S.C. §636 and §455 are undermined when federal courts affirm a magistrate's ruling without addressing procedural misconduct allegations and documented extrajudicial bias the magistrate failed to disclose.

PARTIES TO THE PROCEEDINGS

Petitioners, who are plaintiffs-appellants below, are Michael Hanning Loriz and Cara Francke Loriz, referred to herein as "Loriz."

Respondents, who are defendants-appellees below, are John B. Connaughton (individually); Charles Keller, Christopher Keller, Michael Simmons (individually) and their business Ridge Wind Quail Hunts, LLC (referred to together as "the Shooting Range"); Lee Steenken, Thomas Bevington, Gary Salman, John Zboril, Walt Filpot, Alan Daniel, Michael A. Fox, Gregory V. Jolivette, Charles R. Furmon, Thomas Turner, Richard K. Jones, Anthony E. Dwyer, Robin Piper, Roger Gates, William E. Balsinger, James M. Fox (officials of Butler County, Ohio, and referred to as a group as "the County"); the Hon. Anthony Valen, the Hon. William W. Young, the Hon. Stephen W. Powell (Ohio Twelfth Appellate Court justices referred to as a group as "the Judges"); and Steven A. Gray (Chief, State of Ohio, Division of Wildlife, referred to as "the State").

RULE 29.6 DISCLOSURE STATEMENT

None of the Petitioners is a corporation.

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OPINIONS BELOW

This is an appeal of the opinion of the Sixth Circuit Court of Appeals, recorded at 233 Fed. Appx. 469 (6th Cir. 2007) and reproduced in the Appendix at App. 1-14. The preliminary injunction order of the Sixth Circuit is reproduced at App. 19. The original disposition of the U.S. District Court for the Southern District of Ohio, Case No. 1:05-cv-00306, is unreported and reproduced in pertinent part at App. 31-54.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2007. A petition for panel rehearing and rehearing en banc was denied on September 4, 2007. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioners raise questions as to rights protected by the United States Constitution under the Fifth, the Fourteenth, and the First amendments. App. 84. Petitioners also invoke 42 U.S.C. §1983 (App. 85) for interference with these rights. The ruling below implicates 28 U.S.C. §1257, §636 and §455. App. 86-87.

STATEMENT

Petitioners Mike and Cara Loriz are refugees from their Ohio homestead at the hands of the Respondents. As Sixth Circuit Justices Moore, Cole and Gilman held: "Loriz made the laudable decision to move the family away from the danger" created by state-licensed commercial shotgun fire that trespasses onto their Butler County property (App. 20).

In 1995, Mr. Loriz moved his family to a 45-acre agricultural/residential property in Ohio. After flying Navy F-18s in the Persian Gulf, Mr. Loriz wanted to establish a permanent country home for the family. He built the house himself and reforested the acreage for use in a family wood-working business.

Five years later, with no notice from the State, large-scale shooting events ensued adjacent to the Loriz residence on the property of Respondents Charles and Christopher Keller. Up to 1,000 rounds of 12-gauge shotgun projectiles were fired in a day at live targets planted in a field behind the Loriz home. Shooters, projectiles and dogs trespassed. The family could not exit the house without fear of injury from the rain of lead defendants publicly acknowledged. App. 69-70.

Shooting continues to this day and is authorized by State Division of Wildlife licenses and permits and by a conditional commercial recreation permit granted by the Butler County Board of Zoning Appeals. None of the licenses or permits regulates the Loriz property.

Petitioners filed an administrative appeal of the County permit in the Butler County Court of Common Pleas and subsequently in the Ohio Court of Appeals. The Ohio courts affirmed the granting of the permit without addressing its constitutionality or legality (App. 55-64). Loriz could not challenge State shooting range licenses in state court – the State provides no notice of its licenses to adjacent property owners and no administrative appeal process.

The administrative appeal of the county permit is the only proceeding adjudicated in state court – damage claims have yet to be heard by any court. After the failed administrative appeal, which temporarily stayed the shooting, the Loriz family vacated the property and fled to a house in New York.

Loriz still pays taxes on the Ohio property, insures it and is required by state law to maintain the fence-line along the shooting range.

No court, including this one (*Loriz v. Connaughton*, 127 S. Ct. 1155 (2007)), has enjoined the shooting.

A. District Court Finds A Threat But Dismisses

The Loriz family claims the loss of the most fundamental protections of the Constitution at the hands of the Respondents. They cannot walk on their own property without fear of injury from state-authorized gunfire. They have been barred, practically

and prospectively, from filing criminal charges against anyone shooting towards them. The right to speak freely in protest of government approval of the range: denied, as documented by a law enforcement officer. They cannot sell the property; lead shot has embedded in hardwood trees, in the soil and in streams that supply the Great Miami Aquifer. They cannot safely live on or use their permanently degraded property.

Every effort to vindicate these fundamental rights has been blocked by the Respondents and the courts below.

This fulsome §1983 suit was first filed in the Eastern District of New York in 2004 after the family fled the physical invasion of the Ohio residence. Loriz filed in New York fearing that they could not receive an impartial hearing in Ohio. Loriz re-filed in Ohio after the New York case was dismissed for improper venue in 2005.

The district court had jurisdiction over Loriz claims pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331 and §1332; Loriz later invoked 28 U.S.C. §1367 for jurisdiction of lesser claims.

The facts asserted in the Loriz complaint stand undisputed below (App. 67). Defendants never refuted the fact that shots enter the Loriz property; several publicly acknowledged it (App. 69-70). However, the original *pro se* complaint was flawed: among other prayers, it sought declaratory judgment that the state administrative appeal ruling was unconstitutional, a

flaw that was not fatal to taking claims. Loriz filed a timely amended complaint eliminating this prayer. The district court docketed but then removed the amended complaint at the request of the defendants. Loriz moved for amendment but was never allowed to amend the complaint or pursue discovery.

All Respondents except the County moved for dismissal or summary judgment. Shooting Range defendants repeatedly challenged federal jurisdiction on grounds that their operation served no public purpose and was in fact "purely private."

Loriz sought a preliminary injunction of the shooting in the district court. Government defendants responded *contra* but did not oppose enjoining the private shooting operations. The Shooting Range opposed but offered no evidence to show harm. The County did not reply before Magistrate Judge Timothy S. Black issued his Reports and Recommendations (R&Rs) to dismiss.

The magistrate found compelling claims, specifically that conditions on commercial shooting "are wholly insufficient to protect the Plaintiffs and their property" (App. 33). But he dismissed what he identified as regulatory takings and ancillary claims without prejudice as unripe pursuant to *Williamson County Reg'l Planning Comm's v. Hamilton Bank*, 473 U.S. 172, 186 (1985) for lack of state eminent domain proceedings. He dismissed claims against judicial officers pursuant to *Rooker-Feldman* doctrine (*Rooker*

v. Fidelity Trust Co., 263 U.S. 413 (1923), *District of Columbia v. Feldman*, 460 U.S. 462 (1983)).

Loriz objected to the R&Rs in their entirety and to the magistrate's interruption of a largely unopposed injunction motion. Loriz strenuously objected to denying a first amendment of the complaint, to *sua sponte* dismissal of unchallenged, unnamed claims (including the First Amendment violation) and to the magistrate's bias as substantiated by documented extrajudicial sources the magistrate failed to disclose as required by 28 U.S.C. §455.

The §1983 suit was dismissed in district court by final order of the Honorable Sandra S. Beckwith (App. 21) to adopt the R&Rs as "entirely correct." The order did not mention the pending injunction motion nor did it address any individual objections, including judicial misconduct.

B. The Court of Appeals First Finds a Likelihood of Success And Lauds Abandonment, Then Dismisses With Prejudice

The notice of appeal and appellants' brief were timely filed in the U.S. Court of Appeals for the Sixth Circuit, which had jurisdiction pursuant to 28 U.S.C. §1291. Respondents' request for an extension of time to respond for the sole purpose of filing a single brief was instantaneously granted by the court clerk. Loriz objected: the motion failed to show requisite good cause.

Before response briefs were submitted, Loriz filed a motion for injunction pending appeal.

Sixth Circuit Justices Moore, Cole and Gilman issued an order (App. 19) denying injunction but finding:

> Loriz has a likelihood of success on appeal. The court must ultimately decide whether this case is more analogous to *Williamson County Reg'l Planning Comm's v. Hamilton Bank*, 473 U.S. 172, 186 (1985), or *Montgomery v. Carter County*, 266 F.3d 758, 766-768 (6th Cir. 2000). Loriz has not, however, shown irreparable harm. Loriz made the laudable decision to move the family away from the danger posed by a stray hunter's bullet. Having moved the family away, Loriz now faces economic harm. App. 20.

The order went on: "The court notes that the responses of counsel in this case were distinctly deficient . . . The court trusts that counsel will do a better job when filing their briefs." To the contrary, the joint brief did not address private use takings. It demanded dismissal with prejudice, an enlargement of the district court order.

Loriz requested reconsideration of the injunction denial, specifically the court's finding of no irreparable harm. This prompted opposing responses suggesting that the Loriz family avoid harm by maintaining their property after shooting range business hours or simply by asking their neighbor to cease shooting operations for a while. The Sixth Circuit denied the Loriz reconsideration motion as "not well taken." App. 18.

Loriz filed a timely petition for writ of certiorari in this Court asking whether an unconstitutional taking can cause irreparable harm, an issue taken up by the Court in *Brown v. Legal Foundation of Wash.*, 538 U.S. 216 (2003) but left unresolved. The petition was denied.

When proceedings resumed in the Sixth Circuit, Loriz filed a motion for abatement of taxes pending appeal. A new panel of the Court, Circuit Justices Merritt and Martin and District Judge Forester (sitting by designation from the Eastern District of Kentucky) ordered an oral argument to address the tax abatement issue as well as the merits of the appeal. App. 17.

Pro se Petitioners diligently prepared for oral argument in the nation's second highest court, scheduled for April 20, 2007. Respondents, who had waived oral argument in their brief, then requested it after the injunction ruling, sought clarification; the court confirmed that oral argument on all issues would be heard. App. 15.

On March 31, 2007, Respondent John B. Connaughton died and his counsel moved to dismiss him from the appeal. The court clerk granted the motion before receiving a timely response. Loriz objected on the grounds that the clerk had no authority to grant an opposed dismissal. A call to the case manager indicated that the issue would be addressed at oral argument.

Less than 48-hours before the long-scheduled oral argument, Respondents filed an emergency motion to postpone. Loriz informed the case manager that they opposed the motion, confirmed that oral argument would commence and boarded a plane for Cincinnati. Upon arrival on April 19, Loriz learned that the oral argument was permanently cancelled. The cancellation was never explained nor journalized and occurred *ex parte*, with the Loriz family in flight.

On May 11, 2007 District Judge Karl S. Forester issued the opinion for the circuit court dismissing the case with prejudice without any reference to the favorable injunction order, the need for oral argument or the key issue the original panel of fully-vested justices declared "the court must ultimately decide": whether the takings are for private use or are regulatory in nature.

The circuit ruling dismissed all claims pursuant to *Rooker-Feldman* doctrine, including unchallenged claims, those occurring in violation of state court orders and those arising both before and after a state court administrative appeal. Judge Forester wrote:

> Clearly **all** of the Lorizes' claims were inextricably intertwined with the state court decisions. In order for the district court to grant the requested declaratory or injunctive relief, or to award damages, the district court would be forced to review the decisions of the Ohio Division of Wildlife, the BZA, the Ohio Court of Common Pleas and the Ohio appellate court . . . These claims are exactly the

> type the *Rooker-Feldman* doctrine intended to bar in the lower federal courts. App. 13.

The ruling addressed none of the Petitioner's *Rooker-Feldman* arguments or other substantive errors, including judicial bias.

The district court ruling that takings claims were unripe for *lack* of state proceedings was reversed by an appellate court ruling that those same takings claims had already been heard in state court. Judge Forester's opinion did not revisit any facts or refute that a taking had occurred.

Loriz filed a petition for panel and en banc rehearing, asserting that the ruling improperly expanded *Rooker-Feldman* doctrine in defiance of Supreme Court and Sixth Circuit authorities that limit it and created a jurisdictional bar to all takings plaintiffs seeking final administrative decisions, a *Williamson County* requirement. The court passed on the petition for rehearing, according to the clerk.

This Court is asked to return to the pivotal question correctly posed by the original Sixth Circuit panel: is this type of taking subject to the private takings doctrine of *Montgomery v. Carter County* (*supra*) and *Hawaii Housing Auth v. Midkiff*, 467 U.S. 229 (1984) or by the regulatory takings doctrine of *Williamson County* or by both, as some conflicting circuit decisions suggest?

Such review would *in se* reject the Sixth Circuit's dismissal of all claims pursuant to *Rooker-Feldman*, a doctrine that continues to be improperly expanded in the federal courts despite the restrictions of *Exxon Mobil v. Saudi Indus. Corp.*, 544 U.S. 280 (2005).

Due process, substantively absent below, compels the question of whether federal courts must *de minima* acknowledge documented assertions of judicial misconduct before affirming a lower court decision.

REASONS FOR GRANTING THE WRIT

An American family was virtually shot off their homestead by state-licensed, for-profit activities, as recognized by both the district court and the original Sixth Circuit panel below. And yet this family has never had its day in federal court. The personal damages are inextricably intertwined with a larger question: Can the Bill of Rights retain meaningful guarantees if any family is thus degraded and then permanently blocked from vindicating their rights?

This is a quintessential §1983 case and no doubt an extreme one. By so being, it provides the Court with unequivocal opportunities to address questions of national importance: the uncertainty of the protections of the Public Use Clause after *Kelo v. New London*, 545 U.S. 469 (2005), the barring of federal relief by an all-consuming Just Compensation Clause, and the practical protections of the Due Process

clause. These questions are not entangled in interpretations of state law.

The case also allows scrutiny of the continued over-application of the *Rooker-Feldman* doctrine in dismissing federal cases despite cautions from this Court in *Exxon Mobil*.

Finally, this *pro se* case is a vehicle to restore the public's faith in the judiciary to protect individual rights by correcting federal courts that propound for powerful defendants.

I. THE GUARANTEED PROTECTIONS OF THE PUBLIC USE CLAUSE ARE UNCERTAIN AND IN NEED OF AN AFFIRMATIVE STANDARD IN THIS COURT

This Court's decision in *Kelo v. New London* left many citizens and states reeling: the decision allowed a for-profit, private entity to benefit from a governmental taking of residential property. Concurring in that case, Justice Kennedy stated that such allowances are not unlimited: "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits are forbidden by the Public Use Clause." *Id.* (concurrence, p. 1). However, the Court has yet to test the protections of the Public Use Clause since *Kelo*.

The Fifth Amendment prohibits property deprivations for a private purpose. The Highest Court has espoused this prohibition in theory but an affirmative

standard prohibiting a governmental taking of residential property on grounds that it violated the Public Use Clause is noticeably absent from its citations.

A. Supreme Court Law: Guidance But No Affirmative Standard For Private Takings Of Residential Property

In addition to *Kelo*, the modern Supreme Court standards for private use taking claims are *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) and *Berman v. Parker*, 348 U.S. 26 (1954). *Midkiff* held that "a purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." But the takings in both *Midkiff* and *Berman* were deemed by this Court to be for a public use, as in *Kelo* and likewise in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984). There is no recent Supreme Court example of a prohibited "purely private" taking.

The Supreme Court addressed a taking of residential property that impugned the Public Use Clause in only one frequently cited case. In *Cincinnati v. Vester*, 281 U.S. 439 (1930) the municipality attempted to take residential property without stating any public purpose. But the court passed on a constitutional determination, finding that the taking was prohibited by state law. It does not provide a standard for the "purely private" taking alluded to in *Midkiff*.

Cases commonly cited as prohibiting a private use taking in practice did not involve residential property. *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937) (a statute requiring gas well owners to forgo producing gas and buy it instead from competing well owners was unconstitutional; "Our law reports present no more glaring instance of the taking of one man's property and giving it to another"), *Missouri P.R. Company v. Nebraska*, 164 U.S. 403, 417 (1896) (taking of railway company property for the private use of farmers to erect a grain elevator "is not due process of law.")

Other cases cited as standard bearers for the Public Use Clause warn against private use takings but found that the private entities effecting the taking did so for a public purpose. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-164 (1896) ("we have no doubt that the irrigation of really arid lands is a public purpose"); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (if a state determines that easements for aerial buckets are needed for the public welfare, "[t]he Constitution of the United States does not require us to say that they are wrong"); *Clark v. Nash*, 198 U.S. 361, 369 (1905) (a statute authorizing the owner of arid land to widen a ditch on his neighbor's property presents a use "that is a public one"); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 35 (1916) (private land may be condemned for power distribution; "[i]f that purpose is not public we should be at a loss to say what is").

American homeowners, fearful of private use takings after *Kelo,* can find little comfort in the Supreme Court record. The Loriz case justifies those concerns but also provides an opportunity to affirm the prohibition of "purely private" taking of residential property.

B. A Circuit Consensus on Private Use Taking Emerges But Conflict Remains

Federal appellate decisions likewise engender little confidence that citizens will be vindicated should their property be taken for a private purpose. Federal takings plaintiffs are barred by an increasingly insurmountable Just Compensation Clause as embodied by *Williamson County*.

As in the instant case, other district courts are dismissing private use takings for lacking *Williamson County* criteria: failing to attain "finality" of administrative decisions affecting the taking or to seek state just compensation remedies. And at least one circuit is affirming these decisions and explicitly establishing that private use takings must meet *Williamson County* requirements.

The Seventh Circuit has effectively eliminated the Public Use Clause as a federally protected property right independent of the Just Compensation Clause. *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) (concluding that a plaintiff who contends taking was improper because

it was done for a private purpose must exhaust state remedies before bringing suit in federal court).

A definitive standard on the applicability of *Williamson County* to private use takings has not clearly emerged in the First, Second, Fourth, Tenth and Eleventh Circuits.

In the recent ruling *Rumber v. District of Columbia*, 487 F.3d 941 (2007), the D.C. Circuit reviewed appellate precedents on whether the Public Use Clause is subject to *Williamson County* requirements, highlighting the Seventh Circuit conflict and relying heavily on the Sixth Circuit standard that supports Loriz claims.

> The circuit courts of appeals to address the issue have held that *Williamson County*'s ripeness requirements do not apply to a public use claim. *See Theodorou v. Measel*, 53 F. App'x 640, 643 (3rd Cir. 2002); *Montgomery v. Carter County*, 226 F.3d 758, 766-67 (6th Cir. 2000); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Armendariz v. Penman*, 75 F.3d 1311, 1320-21 & n.5 (9th Cir. 1996) (en banc); *Samaad v. City of Dallas*, 940 F.2d 925, 936-37 (5th Cir. 1991). . . . In *Montgomery*, the Sixth Circuit explained:
>
> > *** Private use takings . . . are unconstitutional regardless of whether just compensation is paid. . . . Requiring a plaintiff to wait before suing in federal court, when her sole claim is that she was dispossessed of property for a private use,

> would have only one apparent purpose – to force the plaintiff to vet her claims in state proceedings . . . But forcing the plaintiff to pursue state 'remedial' procedures would be an exhaustion requirement, a requirement that *Williamson County* explicitly does not impose. *Montgomery*, 226 F.3d at 766-67.

The one circuit taking a different view interprets *Williamson County* very broadly. *See Forseth*,[1] 199 F.3d at 369-70 (citing *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 178-79 (7th Cir. 1996)).

> This court has not addressed whether *Williamson County* applies to public use claims. We find the reasoning of the majority of the circuits persuasive because the Fifth Amendment Takings Clause protects two distinct rights and *Williamson County* does not explicitly require exhaustion for all Fifth Amendment claims. We, therefore, hold that the ripeness requirements of *Williamson County* do not apply to public use claims under the Fifth Amendment. (*Id.* LEXIS 12200, p. 6-8)

Does the Public Use Clause present a "distinct right," as the DC Circuit suggests, that is federally guaranteed independent of the Just Compensation Clause? "It cannot be presumed that any clause in the constitution

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[1] *Forseth v. Village of Sussex*, 199 F. 3d 363 (7th Cir. 2000).

is intended to be without effect." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 174 (1803).

But not all circuits agree. In the opening of the joint *Kelo* dissent, Justice O'Connor warned that the decision would "wash out any distinction between private and public use of property" and "thereby effectively delete the words 'for public use'" from the Bill of Rights. In the instant case, the government has taken property without compensation from citizen A for the use of citizen B, a use described by Citizen B as "purely private." Review and reversal of this case will provide an affirmative standard for private use taking of residential property.

II. JUST COMPENSATION IS OVERRIDING VITAL DUE PROCESS REVIEW

The plight of the Loriz family, facing court-acknowledged physical threats at the hands of the state, begs questioning of the protections of the Due Process Clause. In this and other cases, the Just Compensation Clause has usurped any consideration of due process, whether it be for a private use taking, a physical invasion taking or security deprivations.

This Court emphasized the importance of the Public Use and Due Process clauses in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005): "[I]f a government action is found to be impermissible – for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of

compensation can authorize such action." Unfortunately, inquiries into the authority to take is lacking in the circuit courts. Instead, substantive Due Process claims are considered "unripe" for a lack of just compensation proceedings.

Over-application of *Williamson County* is again the culprit. Relying on *Parrat v. Taylor*, 451 U.S. 527 (1981), which holds that random, unauthorized takings require no pre-deprivation due process, *Williamson County* dictates that until state compensation is sought, no process is due a deprived property owner. Due process is thereby bundled into the *Williamson County* ripeness test, whether the taking is random or not. The result: federal courts need not inquire into due process injuries associated with an uncompensated taking, even when the government had no authority to take property.

In contrast, this Court suggested that due process inquiries should logically come before questions of compensation in *Lingle*, *supra*. This is not readily squared with appellate applications of *Williamson County*.

"Our precedents establish the general rule that individuals must receive notice and be heard before the Government deprives them of property." *U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993) at 47. In that case, this Court held that criminals, unlike law-abiding takings victims, are entitled to notice and a meaningful hearing *before* their residential property is seized.

A. This Court Distinguishes Physical Takings

Due process is pre-empted when just compensation is *the* first impression takings criteria, a dangerous pre-emption during a physical invasion. As this Court stated, "the availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure." *James Daniel Good*, 510 U.S. at 55. The same could be said of a state-controlled compensation hearing after an unauthorized physical invasion taking.

"[A] permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property – perhaps the most fundamental of all property interests." See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

This Court distinguishes permanent physical invasion takings from all others, particularly the temporary, regulatory takings of *Williamson County*. A regulatory taking "does not give the government any right to use the property nor does it dispossess the owner or affect her right to exclude others." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 at n. 19 (2002). This Court found "it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation that there has been a 'regulatory taking' and vice versa." *Id.* at 323. And in

Palazzolo v. Rhode Island, 533 U.S. 606 at 617-618 (2001), this Court held:

> Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations than cases alleging a taking based on a burdensome regulation. In a direct condemnation action, or *when a State has physically invaded the property without filing suit*, the fact and extent of the taking are known. . . . A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied. (emphasis added)

B. Circuit Court Precedents Require Regulatory Taking Test For Physical Invasions

Despite these cautions, federal courts apply the *Williamson County* ripeness test not only to temporary regulatory takings but claims that plaintiffs have suffered unauthorized taking or have already been physically dispossessed of property.

In *Greenfield Mills Inc. v. Macklin,* 361 F.3d 934 (7th Cir. 2004), plaintiffs claimed due process and takings violations associated with an inverse physical invasion. After dismissing the takings claim for lack of ripeness, the court dismissed the plaintiffs' due process claims, holding that "the *Williamson County* exhaustion requirement applies with full force to due process claims (both procedural and substantive)

when based on the same facts" that create the taking. *Id.* at 961. *Williamson County* pre-empted analysis of the government's authority to physically dispossess citizens of property prior to compensation.

Greenfield Mills has developed into a Seventh Circuit standard requiring that "allegations of *physical* takings are subject to a streamlined ripeness analysis; the taking itself constitutes a final action, and therefore a court need only assess whether the plaintiff had availed himself of appropriate state procedures." *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007) citing *Greenfield Mills, supra* at 958.

Other circuits have adopted similar modified ripeness tests for physical invasion takings. *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). These tests assume the first *Williamson County* prong is met – that a physical invasion is a "final" deprivation. But these physical invasion victims are forced to exhaust state inverse condemnation remedies for an "unripe" taking that has already dispossessed them of property.

A similar doctrine is developing in the Sixth Circuit. Ohio has no inverse condemnation statute but in *Coles v. Granville*, 448 F.3d 853 (6th Cir. 2006) the Sixth Circuit established for the first time that mandamus is an adequate *Williamson County* compensation remedy. In superceding *Kruse v. Village of Chagrin Falls*, 74 F.3d 694 (6th Cir. 1996), the Sixth Circuit determined that even the Kruse family, which suddenly

found their back yard removed by the government with no notice and an immediate unwillingness to pay, would now have adequate remedy by seeking condemnation proceedings through mandamus. Such a remedy may be adequate for a prospective regulatory taking, but the higher scrutiny paid *per se* physical invasions seems to require more.

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner," *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). If the state has a "categorical duty to compensate," giving it an opportunity to say, "no, we don't have to compensate" through proceedings it controls deprives citizens of both due process and guaranteed compensation.

Such an outcome conflicts with this Court's holding where "'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation) no matter how weighty the 'public interest' involved." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) at 1028 quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) at 426.

III. ABUNDANT, UNREPORTED DISMISSALS PURSUANT TO *ROOKER-FELDMAN* NECESSITATE AN AUTHORITATIVE TEST

"Since *Feldman*, this Court has never applied *Rooker-Feldman* to dismiss an action for want of

jurisdiction." *Exxon Mobil* at 283. Such could not be said of the lower federal courts at the time of the *Exxon Mobil* decision. Correcting an improper expansion of *Rooker-Feldman*, this Court found that federal law does not bar jurisdiction pending a parallel state proceeding.

> Nor does § 1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.'

Exxon Mobil at 284 quoting *GASH Assocs. v. Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993).

Unfortunately, circuit courts reviewing *Rooker-Feldman* dismissals do not uniformly apply the dispositive directive of *Exxon Mobil*, as seen in the erroneous dismissal of Loriz claims. *Rooker-Feldman* dismissals persist despite *Exxon Mobil*.

This Court was again compelled to address an over-application of *Rooker-Feldman* in *Lance v. Dennis*, 546 U.S. 459 (2006) by a Colorado district court that "erroneously conflated preclusion law with *Rooker-Feldman*." In so doing, it reaffirmed the *Rooker-Feldman* exemption for state agency decisions established in *Verizon Md. Inc. v. Public Serv.*

Comm'n of Md., 535 U.S. 635, 644 n. 3 (2002), an exemption that prohibits the dismissal of the State in the instant case.

A. Circuits Apply *Exxon Mobil* Inconsistently

The Sixth Circuit properly applied the independent claim standard articulated in *Exxon Mobil* in *Coles v. Granville*, 448 F.3d 853 (6th Cir. 2006), stating: "*Exxon* requires this court to examine whether the state court loser who files suit in federal court seeks redress for an injury caused by a state court decision itself or injury caused by the defendant." Unfortunately, the Sixth Circuit does not consistently apply this standard.

The Sixth Circuit had reached the independent claim exemption for *Rooker-Feldman* prior to *Exxon Mobil*, at least for challenged governmental actions. *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386 (6th Cir. 2002) the Sixth Circuit held: "[I]n order to determine whether the *Rooker-Feldman* doctrine is properly applied to this case we must look to what the state court decided." If the state court rulings did not address the legality and constitutionality of the action, the federal court could take jurisdiction without holding that "the state court wrongly decided the issues before it." *Id.* at 395-6, citing *Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998). The instant dismissal ignored this dispositive directive of *Peterson Novelties* raised repeatedly below.

Precedents establishing definitive *Exxon Mobil* restrictions can readily be found in three other circuits: the First, *Davison v. Gov't of P.R. – P.R. Firefighters Corps.*, 471 F.3d 220 (2006) (dismissing but holding that if a plaintiff alleges a constitutional violation by an adverse party independent of the injury caused by the state court judgment jurisdiction lies); the Second, *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77 (2005) (establishing a four-part test to comply with *Exxon Mobil*); and the Fourth, *Washington v. Wilmore*, 407 F.3d 274, 280 (2005) (holding that *Rooker-Feldman* does not apply when the plaintiffs "injury rests not on the state court judgment itself but rather on the alleged violation of his constitutional rights by [the defendant]").

A standard is developing in the Third Circuit where *Turner v. Crawford Square Apts. III, L.P.*, 449 F.3d 542, 547-48 (3rd Cir. 2006) is cited to support jurisdiction of injuries that do not emanate from a state court judgment. In support of *GASH, supra*, in the Seventh Circuit, *TruServ v. Flegles*, 419 F.3d 584 (2005) has been cited once to uphold claims that do not attack a state court ruling.

No new circuit standards for applying *Exxon's* restrictions have emerged in the Fifth, Eighth, Ninth,[2] Tenth, Eleventh or DC Circuits.

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[2] However, the 2003 case, *Noel v. Hall*, 391 F.3d 1148, is applied in the Ninth Circuit as a precursor to *Exxon Mobil*.

B. Dismissals Are Overwhelmingly Unreported

As listed in the appendix (App. 76-83), *Rooker-Feldman* dismissals continue in the circuit courts and, as in the instant case, many fail to apply *Exxon Mobil*'s restrictions. Such dismissals avoid widespread scrutiny by carrying a "not for publication" notice.

A survey of circuit court dismissals since the issuance of *Exxon Mobil* on March 30, 2005 indicates that at least 178 federal cases have been barred pursuant to *Rooker-Feldman*.[3] Of these, 162 or 91 percent were not reported. In the Second, Fourth, Fifth and DC Circuits, all *Rooker-Feldman* dismissals since *Exxon Mobil* went unreported. Only one of dozens of dismissals were worthy of publication in each of the Third, Tenth and Eleventh Circuits.

The six circuits that lack a new standard for applying the restrictions in *Exxon Mobil* account for 103 of the dismissals, 97 of which were unreported.

These dispositions rarely examine the source of damage. Rather cases are dismissed perfunctorily as *de facto* appeals of state court rulings or for asserting "inextricably intertwined" claims. Like the instant case, unpublished dismissals do not necessarily

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[3] *Pro se* Petitioners acknowledge that they are not authoritative legal researchers. But we suggest that the overwhelming disposal of cases without publication speaks for itself.

analyze claims in any meaningful way or even name specific claims.

Prior to *Exxon*, the *Rooker-Feldman* doctrine had "emerged as perhaps the primary docket-clearing workhorse for the federal courts."[4]

"The critics assert that to the extent that the current conception of the *Rooker-Feldman* doctrine overlaps with existing doctrines of preclusion and abstention, it is redundant and unnecessary and to the extent that it reaches beyond the preclusion and abstention doctrines, it is harmful and even illegitimate." ("The *Rooker-Feldman* Doctrine: What Does It Mean to be Inextricable Intertwined?" Alison Jones, 56 *Duke Law Journal* 643 (2006) at 655.)

Civil rights plaintiffs are barred from federal jurisdiction by a doctrine that is potentially "harmful and illegitimate" in rulings that do not carry the full weight of the courts. This threatens the public's faith in the judiciary and is a matter of national importance. The lower federal courts have not heeded this Court's call to rein in *Rooker-Feldman*; an authoritative test may be needed.

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[4] Susan Bandes, "*Rooker-Feldman* Doctrine: Evaluating its Jurisdictional Status," 74 *Notre Dame Law Review* 1175 (1999).

IV. FEDERAL STATUTE IS UNDERMINED WHEN COURTS AFFIRM BIASED RULINGS WITHOUT ADDRESSING JUDICIAL MISCONDUCT

"A fair trial in a fair tribunal is a basic requirement of due process" – so said this Court over 50 years ago. *In re Murchison*, 349 U.S. 133, 136-37 (1955). Congress codified a requirement that federal judges not only be fair and impartial but to disclose potential sources of bias in 28 U.S.C. §455, which, as revised in 1974, "placed the obligation to identify the existence of [bias] grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit." *Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

"Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Murchison, supra*. These authorities dictate that federal judges and magistrates have an obligation to disclose potential bias to ensure fair proceedings. If judges fail to do so, §455 and the Due Process clause may be impugned. In order for these laws to have any authority, undisclosed but documented sources of bias and alleged procedural misconduct must be addressed when properly raised in objections or errors to superior tribunals.

In the instant case, objections to the district court and appellate errors of constitutional magnitude based on a magistrate's procedural misconduct

in violation of §636 and documented, extrajudicial bias sources the magistrate failed to disclose were never mentioned in the rulings of either court.

The proceedings below, if allowed to stand, will further erode the public's confidence in the judiciary. The judiciary's concern with maintaining appearances of impartiality "stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

Federal appellate courts often dismiss cases without addressing the errors raised by the appellants, particularly in *pro se* cases against numerous officials, like this one. *Pro se* Petitioners could find no Supreme Court standard requiring that all properly raised and preserved appeal issues must be addressed in the circuit courts of last resort, a due process issue and a broad one. But we ask this Court to consider a narrower circumstance: whether a federal appellate court can provide due process if it affirms, even in part, a district court ruling challenged on bias and misconduct grounds without addressing the bias error in any way.

Circuit courts and the Supreme Court have generally concluded that §455 is a stricter disqualifier than the Due Process Clause. See *United States v. Alabama*, 828 F.2d 1532, 1540 n. 22 (11th Cir. 1987); *United States v. Sypolt*, 346 F.3d 838, 840 (8th Cir. 2003), *United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990). The law with regard to recusal under

section §455 is straightforward and well-established in the Sixth Circuit. *Getsy v. Mitchell*, 495 F.3d 295 (6th Cir. 2007).

One aspect of §455 is not well-established: if a judge fails to disclose potential sources of bias, sources that may or may not be deemed prejudicial if reviewed, does the failure to disclose amount to a prohibited appearance of impartiality? And does violation of the appearance standard inherently impugn due process?

"[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jericho, Inc.*, 446 U.S. 238, 242 (1980).

While Supreme Court guidance above establishes that judicial bias can create constitutional error theoretically, this Court has never set aside a judgment under the Due Process Clause based on an appearance-of-bias standard.

The circuit courts are not uniform in their review of bias and due process. The Eleventh, Third and Seventh Circuits have rejected a *Murchison*-based appearance standard as violative of the Due Process Clause. *Callaghan v. Campbell*, 427 F.3d 897, 928 (11th Cir. 2005); *Johnson v. Carroll*, 369 F.3d 253 (3rd

Cir. 2004); *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363 (7th Cir. 1994)). The Seventh Circuit distilled 100 years of precedent on the subject as follows: "[t]he Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance." *Del Vecchio*, 31 F.3d at 1371-72.

The Sixth, relying on *Liteky*, combines the two bias rules to establish an impartiality standard far higher than appearance: "In order to prevail in a deprivation of due process claim, a defendant must show a level of bias that made 'fair judgment impossible'." *Alley v. Bell*, 307 F.3d 380, 388 (6th Cir. 2002) quoting *Liteky*, *supra* at 555.

A standard demonstrating when the failure to disclose extrajudicial sources establishes a Due Process violation is needed or the disclosure requirement of §455 will be meaningless to prejudiced parties. Such a standard could compel review of properly preserved bias errors in civil cases.

V. THE *ROOKER-FELDMAN* AND *WILLIAMSON COUNTY* DISMISSALS ARE WRONG

The appellate dismissal of all claims with prejudice leaves the Loriz family, barred from discovery or even amending their complaint, with no legal recourse to vindicate their fundamental rights.

Their only practical alternatives: to return to the property and face a court-acknowledged risk of

physical injury or reluctantly exercise their Second Amendment rights to defend their security against state attack. Please consider whether any other civil rights petitioners before this Court face such an outcome if certiorari is denied.

The challenged ruling not only discards constitutional protections for the Loriz family, it is both facially and substantively erroneous.

A dismissal with prejudice of takings claims based exclusively on the administrative appeal of a zoning permit, a "finality" requirement of *Williamson County*, would intuitively bar *any* regulatory takings claim. Likewise, it creates an unprecedented bar to any claim arising from an agency or administrative decision, whether it was appealed in state court or not. It attempts to extend the full faith and credit of the federal government to all state and county administrators.

The ruling excuses actions that both the district and circuit courts identified as physical threats to the Loriz family from state-authorized, private activities. It's hard to imagine how any fundamental Fifth Amendment claim could survive the legal holding espoused in this ruling.

The unsupportable nature of this ruling may justify summary reversal by this Court.

A. *Williamson County* Dismissal Of Private use, Physical Invasion Takings And *Sua Sponte* Dismissals Err Egregiously

The district court ruling puts the Loriz takings claims in a single category, that of a "regulatory taking." State and county regulation is no doubt involved: the county repeatedly approved and expanded commercial recreational facility permits and the state annually grants commercial shooting permits and licenses without notice or review. But unlike typical *Williamson County* regulatory takings, none of the regulations have been applied to the claimants' property.

The defendants themselves demonstrated the private, hazardous nature of the state-authorized activities. To avoid irreparable harm while maintaining their property, the County and Shooting Range recommended that the Lorizes simply ask their neighbor to cease commercial activities for a while or enter the property after Shooting Range business hours. The suggestion that Citizen A must ask Citizen B for permission to safely use his own property is telling.

Magistrate Black also recognized the physical invasiveness of the taking and by so doing created an internal flaw in his ruling: How can an unripe regulation be "wholly insufficient to protect plaintiffs and their property"? This physical invasion taking requires no ripening; zoning board members and game

wardens are not authorized to physically appropriate property.

The district court dismissed other claims as "ancillary" to the taking and equally "unripe." This the court was not authorized to do. State-created danger and equal protection claims are viable, independent claims that are not controlled by the Just Compensation Clause. *Soldal v. Cook County*, 506 U.S. 56, 69-70 (1992).

The district court *sua sponte* dismissed all claims against the nonmoving County defendants. These claims included First Amendment and equal protection degradations documented by law enforcement officers that were unique to the County. App. 72. This dismissal cannot be reconciled with *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974) (to *sua sponte* dismiss only when allegations are "totally implausible, attenuated, unsubstantial, frivolous, devoid of merit or no longer open to discussion"). It relied exclusively on seldom cited law from another circuit and neglected the *sua sponte* standard for the Sixth Circuit.

Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983) discourages *sua sponte* dismissals, holding that they "cast the district court in the role of 'a proponent rather than an independent entity'" (at 1111, internal citation omitted). *Tingler* further holds that *pro se* plaintiffs are acutely prejudiced by *sua sponte* dismissals. The district court erred but also propounded

for the defendants as indicated by Sixth Circuit law the court ignored.

The district court's ruling was erroneous and prejudiced in its entirety; as such, we ask that all claims against all parties be remanded. Additional dispositive errors include: the denial of a first and timely amended *pro se* complaint and any future amendment on futility grounds (despite finding a physical threat); dismissal of conspiracy claims against private actors (despite the public nature of the conspiracy, App. 70) and dismissal of claims arising from unlawful acts outside a courtroom by a sitting county judge.

B. *Rooker-Feldman* Does Not Tie All Constitutional Guarantees To A Neighbor's Zoning Permit

In the challenged opinion, Judge Forester wrote, "Clearly **all** of the Lorizes' claims were inextricably intertwined with the state court decisions." This is the sole justification the Sixth Circuit offers to dismiss liberty and property deprivations that occurred before, during, after and in violation of a state court adjudication of a neighbor's zoning permit. It must not stand.

The appellate ruling did not correct any facts or refute the magistrate's finding that a taking had occurred. The two federal court dismissals could not be more contradictory: one for a lack of state court proceedings and one holding that takings claims

have, inexplicably, already been addressed in state court.

Judge Forester's opinion does not explain how the meritorious private use taking claim identified by the original Sixth Circuit panel could possibly be adjudicated during an administrative appeal of a neighbor's zoning permit. Or how claims arising after final state court adjudication, like the First Amendment claim, could be barred by *Rooker-Feldman*. Dismissal of Equal Protection and state-created danger claims are likewise unexplained.

The dismissal of the State of Ohio on *Rooker-Feldman* grounds is, with all due respect, unfathomable. The State was never a party to the administrative appeal of a County decision nor could it be a party to any administrative appeal: Ohio law provides no notice and no procedure to appeal Division of Wildlife licenses. The State never raised a *Rooker-Feldman* jurisdictional bar below, the magistrate did not apply it and the State did not file timely objections or a cross appeal. All of the shooting that manifests the taking and threatens the Loriz family (i.e., injury caused by the defendants, not by a state court decision) is licensed by the State, licenses that are barred from challenge in state court.

The *Rooker-Feldman* dismissal cannot be reconciled with the undisputed fact that no taking or other damage claims have ever been adjudicated in state court. It cannot be reconciled with the injunction order finding likely success of a private use taking

claim. It cannot be reconciled with district court findings the appellate dismissal did not refute.

The dismissal likewise cannot be reconciled with authoritative law. It ignored the relevant restrictions of *Exxon Mobil* and *Peterson Novelties'* explicit tests for federal jurisdiction of claims, relying instead an unexamined "inextricably intertwined" holding. It undermines the state administrative decisions exemption to *Rooker-Feldman* in *Verizon Md.* and *Lance v. Davis.*

The ruling holds, "In order for the district court to grant the requested declaratory or injunctive relief, or to award damages, the district court would be forced to review the decisions of the Ohio Division of Wildlife, the BZA, the Ohio Court of Common Pleas and the Ohio appellate court." And the federal courts are barred from doing so by *Rooker-Feldman*, Judge Forester suggests.

The ruling equates the decisions of state and county administrators to those of the state courts. This is unprecedented and could not have been intended by Congress. The Court of Appeals has no authority to legislate new restrictions on federal jurisdiction from the bench that tamper with 28 U.S.C. §1257 and essentially void 42 U.S.C. §1983.

The appellate court affirms the district court ruling in part and, like the district court, improperly dismisses claims against the county *sua sponte* without naming them. Declaring unchallenged, unnamed

claims to be "inextricably intertwined" with any ruling is untenable.

C. Failure To Address Judicial Bias Amplifies The Prejudice And Degrades Public Faith In The Judiciary

Magistrate Timothy Black received campaign contributions of at least $1,125 from members of the law firm of Alphonse Gerhardstein, counsel to the Shooting Range, during failed Ohio Supreme Court campaigns.

Mr. Black and Mr. Gerhardstein were co-defendants in a controversial §1983 case in the federal courts below in which abortion rights protestors were arrested on warrants secured by the duo before any protests had occurred. Their joint acts were described by the Sixth Circuit as akin to those of the Klan. *Davis v. Crush*, 862 F.2d 84 (6th Cir. 1988). Mr. Gerhardstein was acting as attorney to Mr. Black and other members of a Cincinnati board of Planned Parenthood. The case was settled in municipal court and the protestors achieved a global settlement that released Mr. Black from any liabilities, according to statements from the opposing attorney.

As asserted below, these publicly documented sources of extrajudicial bias warrant recusal. Furthermore, Magistrate Black had an obligation under federal law to disclose them; he did not.

In addition to defying §455, Magistrate Black also acted in prohibition of 28 U.S.C. §636, which stipulates that a magistrate may not determine "a motion for injunctive relief." The injunction motion in the district court was not substantively opposed; governmental defendants explicitly stated that they did not oppose enjoining the private shooting operation. The County asked for an extension of time. Before they responded, Magistrate Black issued his R&Rs dismissing the case and, importantly, *sua sponte* dismissing the County, a biased act and one necessary to dispose of the pending injunction motion.

No mention of the injunction motion is made in Chief Justice Beckwith's order adopting the R&Rs as entirely correct. A substantively unopposed injunction motion was denied without review by a fully vested judge, as required by federal code.

Coupled with procedural misconduct, Magistrate Black's failure to disclose extrajudicial sources of bias defied federal code and denied due process.

The district court's adoption of biased rulings by a magistrate propounding for his former attorney, campaign donor and controversial co-defendant threatens the public trust in the judiciary.

By failing to address properly preserved judicial bias claims, by *sua sponte* dismissing anew and by adopting arguments that were not preserved below, the Sixth Circuit has amplified the prejudice.

The Sixth Circuit's ruling cannot be reconciled with any relevant authority of this Court, with its own orders, with the district court ruling or with federal code. It leaves an American family with no recourse but to risk injury in order to exercise "the sacred and inviolable rights of private property."[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] 1 Commentaries on the Laws of England 134-135 (1765), William Blackstone.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 06-3427

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHAEL HANNING LORIZ and CARA FRANCKE LORIZ Plaintiffs-Appellants, v. JOHN B. CONNAUGHTON, *et al*, Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO (Filed May 11, 2007)

Before: MERRITT and MARTIN, Circuit Judges; FORESTER, Senior District Judge.*

KARL S. FORESTER, Senior District Judge. The Petitioners-Appellants, Michael Hanning Loriz and Cara Francke Loriz, *pro se,* filed a civil rights complaint against 25 public and private sector individuals, alleging various violations of their constitutional rights. The district court granted the motions to dismiss and motion for judgment on the pleadings filed by some of the defendants, and dismissed, *sua*

* The Honorable Karl S. Forester, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

sponte, the remaining defendants. This timely appeal followed.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1995, the Lorizes purchased a 45-acre farm in Butler County, Ohio. On the farm, the Lorizes established a hardwood veneer tree business and built a 5,000 square foot home with a professional woodworking shop in the basement, along with a barn and large shed. After the Lorizes purchased the Butler County farm, their neighbors, defendants Charles Keller and Michael Simmons, applied for a zoning variance in order to operate a commercial bird hunting operation, including a shooting range, on the lot adjacent to the Lorizes' property. The Ohio Department of Natural Resources' Division of Wildlife subsequently approved various permit applications by Keller and Simmons to commence operation of their hunting business, which opened in January 2001.

In March 2001, the Butler County Zoning Department applied for a temporary restraining order to halt the operation of the hunting business, but the petition was denied. The Lorizes then filed a civil action in the Court of Common Pleas of Butler County, Ohio against Keller, Simmons, and others, alleging that the operation of the shooting range constituted an unlawful nuisance and claiming that the hunting business resulted in their loss of the

quiet enjoyment of their property. Apparently, this state court litigation is ongoing.

The Lorizes allege that in April 2001, the Butler County Board of Zoning Appeals (the "BZA") found Keller and Simmons in violation of county zoning resolutions. However, on July 17, 2001 and February 23, 2003, the BZA approved conditional use permits allowing the hunting business to continue operation. The BZA did, however, establish conditions for the shooting range, including requiring a 300 foot buffer zone between the Lorizes' property and the range activities. The Lorizes contend that the BZA-imposed conditions are insufficient to protect them and their property.

The Lorizes appealed the decision of the BZA to the Butler County Court of Common Pleas. This court remanded the matter to the BZA for further proceedings and ordered the BZA to submit written findings of fact to the Court of Common Pleas. On remand, the BZA conducted a hearing and heard additional testimony, then filed its Conclusions of Fact with the Court of Common Pleas. On April 11, 2003, the Court of Common Pleas affirmed the BZA's decision granting a conditional use permit to operate the shooting range. On appeal, the Ohio Court of Appeals for the Twelfth District affirmed the decision of the Court of Common Pleas.

On May 4, 2005, the Lorizes commenced this civil action. Essentially, the Lorizes allege that the Ohio Division of Wildlife, the Butler County Board of

Zoning Appeals, and the Ohio courts improperly approved a commercial shooting range to be operated adjacent to the Lorizes' residence and tree farm. The named defendants are the owners of the shooting range and their attorney, the Ohio Court of Appeals Judges who presided over the Lorizes' appeal, various Butler County officials, and the Ohio Division of Wildlife Chief.[1] The Lorizes seek compensatory damages, as well as declaratory and injunctive relief; specifically:

(1) a declaratory judgment establishing that the BZA approval of the subject shooting range was unlawful and unconstitutional, and a permanent injunction against the BZA from permitting shooting range operations as a conditional use;

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[1] The named defendants include: the operators of the commercial shooting range, Charles Keller, Christopher Keller, Michael Simmons, and Ridge Wind Quail Hunts, LLC, and their attorney, John B. Connaughton; the members of the Butler County Board of Zoning Appeals, Lee Steenken, Thomas Bevington, Gary Salman, John Zboril, Walt Filpot, and Alan Daniel; the Butler County Commissioners, Michael A. Fox, Gregory Jolivette, and Charles R. Furmon; and Judges of the Ohio Court of Appeals for the Twelfth Appellate District, the Honorable Anthony Valen, the Honorable William W. Young, and the Honorable Steven W. Powell; Butler County Warrant Officer, Thomas Turner; Butler County Sheriff, Richard K. Jones; Butler County Chief Deputy Sheriff, Anthony E. Dwyer, Butler County Prosecuting Attorney, Robin Piper, Butler County Assistance Prosecuting Attorney, Roger Gates; Butler County Chief Zoning Inspector, William Balinsinger, Bulter County Zoning Inspector, James M. Fox; and Ohio Department of Natural Resources Wildlife Division Chief, Steven A. Gray.

(2) a permanent injunction against defendant Gray from permitting any shotgun shooting operations, public or private, including the subject shooting range that are not in compliance with the National Rifle Association ballistic guidelines for setback from all lot lines;

(3) a diligent and thorough investigation by the United States Attorney into corrupt practices within the Butler County Sheriff, Prosecutor, Judicial, and Executive departments;

(4) payment of the fair market value (prior to the shooting range) for Lorizes' residence and property, and assumption of all liabilities for lead contamination of the Lorizes' property;

(5) money damages (incidental and punitive) in the amount of $10,000,000; and

(6) any further relief the Court deems appropriate.

In response to the Lorizes' Complaint, Defendants Valen, Young, Powell and Connaughton filed a motion to dismiss. Defendants Keller, Keller, Simmons, and Ridge Wind Quail Hunts, L.L.C. filed a separate motion to dismiss, and Defendant Gray filed a motion for judgment on the pleadings. The remaining defendants filed an answer.

This matter was referred to the United States Magistrate Judge for report and recommendation. In his Report and Recommendations, the Magistrate Judge first reviewed the Lorizes' claims under 42

U.S.C. § 1983 that the approval and operation of the shooting range resulted in a taking of their property in violation of the Fifth Amendment to the U.S. Constitution. Because the Lorizes have not availed themselves of any of the state-provided remedies for the alleged inverse condemnation of their property, the Magistrate Judge recommended that this claim be denied as unripe and dismissed without prejudice for lack of subject matter jurisdiction.

Next, the Magistrate Judge considered the motion to dismiss by defendants, Valen, Young, and Powell, the Judges of the Ohio Court of Appeals for the Twelfth Appellate District who presided over the Lorizes' appeal of the decisions of the BZA and the Court of Common Pleas (the "Judges"), and defendant Connaughton, a part-time county judge and a practicing attorney who represented the shooting range operators during the zoning proceedings before the BZA. Based on the decisions of the United States Supreme Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 68 L. Ed. 362 (1923) (holding that review of final judgments of the state courts can only be obtained by writ of certiorari to the United States Supreme Court), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 483-84, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) (holding that lower federal courts possess no jurisdiction over state court decisions), the Magistrate Judge found that the district court lacked jurisdiction to consider the Lorizes' challenges to the constitutionality of the judicial acts of the state courts to the extent

the Lorizes seek a declaratory judgment regarding the zoning of the shooting range.

Moreover, the Magistrate Judge determined that the Judges are absolutely immune from individual liability for monetary relief for the performance of any "judicial act" unless there is a "clear absence of all jurisdiction." *See Stump v. Sparkman,* 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978); *King v. Love,* 766 F.2d 962, 966-67 (6th Cir. 1985). Because each of the Judges acted in his judicial capacity when presiding over the Lorizes' zoning appeal, the Magistrate Judge recommended they be absolutely immune from the Lorizes' claims. Additionally, the Magistrate Judge found that the Lorizes' Complaint failed to state a claim against the Judges and defendant Connaughton because it does not allege that these defendants deprived them of a federally protected right as required by 42 U.S.C. § 1983. Thus, the Magistrate Judge recommended the Judges' and Connaughton's motion to dismiss be granted.

Next, the Magistrate Judge turned to the motion to dismiss filed by defendants Keller, Keller, Simmons and Ridge Wind Quail Hunts, L.L.C. (the "Ridge Wind" defendants). Relying again on *Rooker* and *Feldman,* the Magistrate Judge found that the court was barred from re-litigating the Lorizes' claim inasmuch as it seeks a declaration that the Ohio courts erred in approving the BZA's approval of the shooting range. Moreover, the Magistrate Judge determined that the Lorizes' claims under § 1983 must be dismissed because the Ridge Wind defendants are not

state actors and cannot be found liable under § 1983. Even if these defendants willfully participated in a joint action with state actors conspiring to violate the Lorizes' constitutional rights, the Magistrate Judge found the Lorizes' complaint devoid of sufficient allegations to withstand a Rule 12(b)(6) motion. To the extent that the Lorizes allege that their due process rights were violated by the failure of some state official to prosecute the Ridge Wind defendants, the Magistrate Judge determined that the Lorizes have no constitutional right to have another person prosecuted. *See Town of Castle Rock, Colorado v. Gonzales,* 545 U.S. 748, 767, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005). Accordingly, the Magistrate Judge recommended that the Ridge Wind defendants' motion to dismiss be granted.

Next, the Magistrate Judge turned to defendant Gray's motion for judgment on the pleadings. The crux of the Lorizes' allegations against defendant Gray, the Chief of the Ohio Division of Wildlife, center on the issuance of various permits to the Ridge Wind defendants. According to the Lorizes, these permits were issued in violation of their due process rights and resulted in an unlawful taking of their property. The Magistrate Judge, however, noted that the takings clause is not implicated until just compensation has been denied. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194, n. 13, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). Because the Lorizes have not exhausted the available state procedures to seek just

compensation, they are precluded from pursuing this § 1983 takings claim in federal court. Therefore, the Magistrate Judge recommended that defendant Gray's motion for judgment on the pleadings be granted.

Finally, although defendants Steenken, Bevington, Salman, Turner, Gates, Balsinger, J. Fox, Zboril, Filpot, Daniel, M. Fox, Jolivette, Furmon, Dwyer, Jones and Piper have not moved for dismissal, the Magistrate Judge determined that the Lorizes' claims against these defendants fail for the same reasons they cannot succeed against the other defendants. Thus, the Magistrate Judge recommended that the Lorizes' Complaint be dismissed for failure to state a claim upon which relief can be granted against these non-moving defendants. With respect to all other pending motions, including the Lorizes' motion to amend their Complaint and for supplemental jurisdiction, the Magistrate Judge recommended that these motions be denied, and this action be terminated.

The Lorizes filed timely objections to the Report and Recommendation. Additionally, defendant Gray also filed his objections to the Report and Recommendation, arguing that it should be expanded to include additional reasons why he is entitled to judgment in this action. On February 24, 2006, the district court entered its Order Adopting Reports and Recommendation, noting that the court considered *de novo* the objections raised, and finding that the Magistrate Judge's recommendations are "entirely correct." The Court then adopted the Report and Recommendations,

granted the motions to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) and for judgment on the pleadings pursuant to Rule 12(c), and dismissed, *sua sponte,* the Lorizes' claims against the nonmoving defendants. This timely appeal followed.[2]

II. ANALYSIS

The district court dismissed the Lorizes' Complaint, in part, due to lack of subject matter jurisdiction over the Lorizes' claims. Essentially, the Lorizes' Complaint seeks federal district court review over the decision of the BZA to approve the shooting range, the decision of the Ohio Department of Wildlife to issue various permits associated with the shooting range, and the decisions of the Ohio courts to uphold the decision of the BZA. The district court held that the *Rooker-Feldman* doctrine barred federal jurisdiction over the Lorizes' claims. This court reviews *de novo* a district court's dismissal of a case on the grounds that the *Rooker-Feldman* doctrine deprives it of subject matter jurisdiction. *McCormick v. Braverman,* 451

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[2] The Lorizes request that the Court strike the defendants' briefs on two grounds. First, although defendant Gray filed a proper motion for extension of time to file his brief, which was granted by the Clerk on June 6, 2006, the Lorizes argue that defendant Gray's brief should be stricken because the motion for extension was not made in good faith. Second, the Lorizes argue that both appellee briefs should be stricken to the extent that they substantively challenge the district court's ruling, despite failing to file a cross appeal. Neither of these challenges are well taken, and the Lorizes' request is denied.

F.3d 382, 389 (6th Cir. 2006), *petition for cert. filed,* (March 12, 2007) (No. 06-10156).

Under the *Rooker-Feldman* doctrine, federal district courts lack subject matter jurisdiction "to engage in appellate review of state court proceedings or to adjudicate claims 'inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties, Inc. v. City of Berkley,* 305 F.3d 386, 390 (6th Cir. 2002). Only the United States Supreme Court may conduct federal review of state court proceedings. *See* 28 U.S.C. § 1257; *Patmon v. Michigan Supreme Court,* 224 F.3d 504, 506 (6th Cir. 2000).

The Sixth Circuit applies a two-part test to determine whether the *Rooker-Feldman* doctrine applies to bar an action. First, the federal claim must be inextricably intertwined with the state-court judgment. In other words, "if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it," then the federal claim is inextricably intertwined with the state court judgment. *Peterson,* 305 F.3d at 391. "The key point is that the source of the injury must be from the state court judgment itself; a claim alleging another source of injury is an independent claim." *McCormick,* 451 F.3d at 394. Second, there is no federal jurisdiction when the claim is "a specific grievance that the law was invalidly – even unconstitutionally – applied in the plaintiff's particular case." *Tropf v. Fidelity Nat'l Title Ins. Co.,* 289 F.3d 929, 937 (6th Cir. 2002) (citing *Catz v. Chalker,* 142 F.3d 279, 293 (6th Cir. 1998))

The *Rooker-Feldman* doctrine has very limited application. In both *Rooker* and *Feldman,* the Supreme Court dismissed the suits for lack of subject matter jurisdiction on the grounds that pursuant to 28 U.S.C. § 1257, only the Supreme Court, and not the lower federal courts, has appellate jurisdiction over state court decisions. *See Rooker,* 263 U.S. at 414-15, 44 S.Ct. 149; *Feldman,* 460 U.S. at 478-79, 103 S.Ct. 1303. The *Feldman* court noted that plaintiffs could still challenge state rules on constitutional grounds because such a challenge would not be asking the district courts to exercise appellate jurisdiction over a state court. *Feldman,* 460 U.S. at 487-88, 103 S.Ct. 1303.

The Supreme Court recently revisited the *Rooker-Feldman* doctrine in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). The court in *Exxon Mobil* was faced with a case where there were parallel state and federal cases on the same issue. The Supreme Court held that the *Rooker-Feldman* doctrine applied only to:

> cases brought by state-court losers complaining of injuries cause by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

Exxon Mobil, 544 U.S. at 284, 125 S.Ct. 1517. The Sixth Circuit Court of Appeals has interpreted this ruling to mean that *Rooker-Feldman* doctrine only applies when a plaintiff complains of injury from the state court judgment itself. *Coles v. Granville*, 448 F.3d 853, 858 (6th Cir. 2006); *Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432, 435-46 (6th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 261, 166 L. Ed. 2d 151 (2006).

Clearly, **all** of the Lorizes' claims were inextricably intertwined with the state court decisions. In order for the district court to grant the requested declaratory or injunctive relief, or to award damages, the district court would be forced to review the decisions of the Ohio Division of Wildlife, the BZA, the Ohio Court of Common Pleas, and the Ohio appellate court. Moreover, the relief the Lorizes seek – a declaration that the state courts reached an improper result based on a faulty application of the law – is not a general challenge to the constitutionality of the state law, but rather a specific grievance over specific decisions. These claims are exactly the type the *Rooker-Feldman* doctrine intended to bar in the lower federal courts. Accordingly, the district court appropriately granted the defendants' motions to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction over the Lorizes' claims.

Although this Court finds that the *Rooker-Feldman* doctrine bars **all** of the Lorizes' claims against the defendants, the district court only applied the *Rooker-Feldman* doctrine to the Lorizes' claims

against the Defendant Judges, John Connaughton, and the Ridge Wind defendants that were not based on the Fifth Amendment. The district court chose to separately analyze the Lorizes' Fifth Amendment claims and determined that because the Lorizes had not availed themselves of any state-provided remedies for the alleged inverse condemnation of their property, these claims are not yet ripe. As a result, the district court dismissed these claims without prejudice. For the reasons set forth above, however, this Court finds that all of the Lorizes' claims are inextricably intertwined with the state court judgments and are not a challenge to state rules on constitutional grounds, but rather a specific grievance over a specific decision. Essentially, the Lorizes are attempting to seek further review of the state court decisions by couching their Complaint in constitutional terms. *Rooker-Feldman* specifically prohibits this. Thus, the district court lacked subject matter jurisdiction over all of the Lorizes' claims and erred by dismissing the Fifth Amendment claims without prejudice as unripe.

III. CONCLUSION

For the reasons set forth above, the decision of the district court is AFFIRMED IN PART and REVERSED IN PART. This matter is REMANDED to the district court for entry of judgment dismissing the entire action with prejudice for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.

No. 06-3427

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL HANNING LORIZ, et al.,	)	
Plaintiffs-Appellants,	)	ORDER
v.	)	(Filed Mar. 20, 2007)
JOHN B. CONNAUGHTON, et al.,	)	
Defendants-Appellees.	)	

Before: MERRITT, MARTIN, Circuit Judges; and FORESTER.*

On March 12, 2007, counsel filed a request for clarification. The parties are hereby advised that this case is scheduled for oral argument on April 20, 2007. The Court will consider the merits of the appeal, as well as any pending motions at that time. If counsel wishes to dispense with oral argument, they should notify the Clerk of the Court as soon as possible.

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* Hon. Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green [/s/ NB]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3427

MICHAEL HANNING LORIZ, CARA FRANCKE LORIZ, Plaintiffs-Appellants, v. JOHN B. CONNAUGHTON, et al., Defendants-Appellees.	)	**ORDER** (Filed Feb. 26, 2007)

BEFORE: MERRITT, MARTIN, Circuit Judges; FORESTER, District Judge*

The plaintiffs-appellants have moved to abate the payment of property taxes on the property in question ending the disposition of this proceeding.

On consideration of the motion, the Court agrees that the parties may raise this issue at the oral argument currently scheduled for April 20, 2007.

ENTERED BY ORDER OF
COURT

/s/ Leonard Green [/s/ NB]
Leonard Green, Clerk

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* Hon. Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

No. 06-3427

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL HANNING LORIZ; CARA FRANCKE LORIS, et al.,	)	
Plaintiffs-Appellants,	)	ORDER
v.	)	(Filed Oct. 10 2007)
JOHN B. CONNAUGHTON, et al.,	)	
Defendants-Appellees.	)	

Before: MOORE, COLE, and GILMAN, Circuit Judges.

Michael and Cara Loriz move for reconsideration of this court's order denying their motion for an injunction pending appeal.

Upon consideration, the court concludes that the motion is not well-taken. The motion to reconsider is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green [/s/ Illegible]
Clerk

No. 06-3427

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL HANNING LORIZ; CARA FRANCKE LORIZ,	)	
Plaintiffs-Appellants,	)	ORDER
v.	)	(Filed Aug. 18, 2006)
JOHN B. CONNAUGHTON, et al.,	)	
Defendants-Appellees.	)	

Before: MOORE, COLE, and GILMAN, Circuit Judges.

Plaintiffs-appellants Michael and Cara Loriz (Loriz) move for an injunction pending appeal in this private civil rights action. 42 U.S.C. § 1983. The four factors to be considered concerning such a motion are: (1) the likelihood of success on appeal; (2) the existence of irreparable harm; (3) a lack of harm to others; and (4) whether the public interest favors injunction. *See Grutter v. Bollinger*, 247 F.3d 631, 632-33 (6th Cir. 2001) (order).

Loriz has shown a likelihood of success on appeal. The court must ultimately decide whether this case is more analogous to *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172,

186 (1985), or *Montgomery v. Carter County*, 266 F.3d 758, 766-768 (6th Cir. 2000). Loriz has not, however, shown irreparable harm. Loriz made the laudable decision to move the family away from the danger posed by a stray hunter's bullet. Having moved the family away, Loriz now faces economic harm. Mere economic damages, however, do not constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Therefore the motion for an injunction pending appeal lacks merit.

The court notes that the responses by counsel in this case were distinctly deficient. The response from the public official defendants attempted to incorporate a district court document, a practice disfavored by the court. Counsel for the private defendants provided neither a docket sheet nor a narrative description of the current proceedings in the pending state court action between these parties. Such deficiencies are not what the court expects from counsel appearing before the Sixth Circuit. The court trusts that counsel will do a better job when filing their briefs.

The motion for an injunction pending appeal is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Michael Hanning Loriz, *et al.*, Plaintiffs,	)	Case No. 1:05-CV-306
vs.	)	
John B. Connaughton, *et al.*, Defendants.	)	

Order Adopting Reports and Recommendations

(Filed Feb. 24, 2006)

On December 29, 2005, United States Magistrate Judge Timothy S. Black issued three Reports and Recommendations in this matter. He recommended that the Court grant the following motions: a motion to dismiss by Defendants Young, Valen, and Connaughton (Doc. 14); a motion to dismiss by Defendants Christopher Keller, Charles Keller, Simmons, and Ridge Wind Quail Hunts, LLC (Doc. 19); and a motion for judgment on the pleadings by Defendant Gray (Doc. 25). The Magistrate Judge further recommended that the Court dismiss *sua sponte* Plaintiffs' claims against all non-moving parties and close this action. He recommended that Plaintiffs' motion to amend their complaint (Doc. 38) and their motion for supplemental jurisdiction (Doc. 44) be denied.

Plaintiffs have objected to each of the reports and recommendations. Their objections do not alter the Court's conclusion, however, considering the matters to which objections have been raised *de novo*, that the Magistrate Judge's recommendations are entirely correct. Accordingly, the Court hereby **ADOPTS** the Reports and Recommendations and **GRANTS** the dispositive motions by Defendants (Doc. 14, Doc. 19, and Doc. 25). The Court further **DISMISSES** *sua sponte* Plaintiffs' claims against non-moving Defendants and **CLOSES** this action. Plaintiffs' motions to amend their complaint (Doc. 38) and for supplemental jurisdiction (Doc. 44) are hereby **DENIED**.

IT IS SO ORDERED.

/s/
Sandra S. Beckwith,
Chief Judge
United States District Court

United States District Court
Southern District of Ohio
Western Division

MICHAEL LORIZ, *et al.*,

Plaintiffs,

vs.

JOHN B. CONNAUGHTON, *et al.*,

Defendants.

Case No. 1:05-cv-306

Beckwith, C.J.
Black, M.J.

REPORT AND RECOMMENDATION[1] THAT PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT BE DENIED (Doc. 38)

(Filed Dec. 29, 2005)

This is a civil rights action brought under 42 U.S.C. § 1983. (Doc. 1). Now before the Court is Plaintiffs' *pro se* motion for leave to amend their complaint (doc. 38), and the parties' responsive memoranda (docs 39, 42, 43, 46, 47, 48).

Plaintiffs' proposed amended complaint seeks to add the State of Ohio as a defendant, appears to add a claim under the Clean Water Act, and provides additional assertions in support of their claims under § 1983. Defendants, however, maintain that the Plaintiffs' proposed amendment of the complaint

[1] Attached hereto is a notice to the parties regarding objections to this Report and Recommendation.

would be futile, and, therefore, that Plaintiffs' motion to amend should be denied.

I.

Leave to amend a complaint shall be freely granted when justice requires. Fed. R. Civ. P. 15(a). Rule 15(a) embodies "a liberal policy of permitting amendments to ensure the determinations of claims on their merits." *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987). However, *denial of a motion to amend is proper "if the amendment* is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or *would be futile.*" *Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995), *cert. denied*, 517 U.S. 1121 (1996) (emphasis supplied).

II.

A. Claims Against the State of Ohio.

Plaintiffs' proposed amended complaint seeks to add the State of Ohio as a defendant in this matter.

However, the Eleventh Amendment provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of a Foreign State.

U.S. Const. amend. XI.

This immunity is far reaching. It bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100-01 (1984), by citizens of another state, foreigners or its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). Plaintiffs assert, however, that they are alleging a general challenge to Ohio law and, therefore, should be granted leave to amend their complaint. Specifically, paragraph 51 of Plaintiffs' proposed amended complaint provides:

> Ohio law allows the Division of Wildlife to grant permits for massive shooting events under the auspices of "field trials" or "dog training" with the only prerequisites being a fee and proof that they are using a maximum of 50 acres of land, which is not nearly enough to contain 12-gauge shotgun fire. This law violates Plaintiffs' 5th and 14th amendment rights to property and due process and is unconstitutional. Therefore, the State of Ohio is a defendant in this case.

Presumably, Plaintiffs' "rights to property" relate to the Fifth Amendment's prohibition of taking property without just compensation.

As noted in the undersigned's Report and Recommendation, the central theme of Plaintiffs' complaint is that the approval and operation of the shooting range resulted in a taking of their property in violation of the Fifth Amendment. However, Plaintiffs' takings claims and ancillary claims of violations

of substantive and procedural due process are not ripe. *See Hammond v. Baldwin*, 866 F.2d 172, 179 (6th Cir. 1989) ("the plaintiffs have a state remedy to address the alleged damage to their property; and a suit under 42 U.S.C. § 1983 is inappropriate until a final decision of the state in an inverse condemnation actions [sic] is entered against the plaintiffs"); *Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 160 (6th Cir.1992) ("Until the state courts have ruled on the plaintiffs' inverse condemnation claim, this court cannot determine whether a taking has occurred, and thus cannot address the procedural due process claim with a full understanding of the relevant facts.").

Accordingly, the Court lacks jurisdiction over these takings claims, and their ancillary ones, and these claims against the State would not survive a motion to dismiss. *See Bigelow*, 970 F.2d at 157 ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised *sua sponte* if not raised by the parties.")

B. Claims Under the Clean Water Act.

Paragraph 57 of Plaintiffs' proposed amended complaint appears to assert claims under the federal Clean Water Act (the "CWA") as a result of discarded lead found in the soil of Plaintiffs' property. However, Title 33 U.S.C. § 1365(b)(1)(A) of the CWA provides, in pertinent part, that:

> No action may be commenced [under the citizen suit provision] . . . prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation or order. . . .

Id.; *see also Board of Trustees of Painesville Tp. v. City of Painesville, Ohio*, 200 F.3d 396, 400 (6th Cir. 1999) (citing 33 U.S.C. § 1365(b)(1)(A)).

Furthermore, compliance with the notice requirement is a jurisdictional prerequisite to a claim under the CWA. See *Bd of Trustees of Painesville*, 200 F.3d at 400 ("This circuit has always required plaintiffs to adhere to § 1365's notice provision because compliance with the notice requirement is a jurisdictional perquisite to recovery under the statute.").

Here, Plaintiffs have not provided such notice. As a result, this Court lacks jurisdiction over any claim arising under the CWA, and, therefore, to the extent Plaintiffs are attempting to assert a claim under the CWA, any such amendment would be futile.

C. Assertions Relating to the § 1983 Claims.

i. Conspiracy Claims.

Plaintiffs' remaining proposed amendments seek to fortify their claims for conspiracy.

In *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir.1985), the Sixth Circuit explained:

> A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged co-conspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant. *Id.*

The Sixth Circuit has repeatedly held that "general" allegations of a conspiracy are insufficient to withstand a motion to dismiss. Simply stating in a complaint that a conspiracy was present is not enough to survive a Rule 12(b)(6) motion. *See, e.g.*, *Spadafore v. Gardner*, 330 F.3d 849, 853 (6th Cir. 2003) (dismissing complaint because it lacked "the requisite degree of specificity"); *Morris v. Boyd*, 39 Fed. Appx. 281, 283-84 (6th Cir. 2002) (dismissing claim alleging conspiracy between police officer and social worker who each allegedly gave false testimony, as plaintiff had not alleged an agreement between the two to do so); *Young v. Gundy*, 30 Fed. Appx. 568, 569 (6th Cir. 2002) (dismissing complaint where it contained only a "bare assertion of a conspiracy" but lacked factual support for such an assertion); *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 541 (6th Cir. 2002) (dismissing deficient

complaint because "vague and conclusory allegations unsupported by material facts are insufficient to sustain a conspiracy claim under § 1983").

Here, Plaintiff's amended complaint fails to allege any agreement and/or a joint concerted effort between the Defendants to deprive Plaintiffs of their civil rights. Rather, Plaintiffs' proposed amended complaint contains vague and conclusory allegations suggesting that a conspiracy existed. Accordingly, Plaintiffs' amended conspiracy claims would not survive a motion to dismiss.

For the foregoing reasons, the undersigned recommends that the Court **DENY** Plaintiffs' motion to amend their complaint.

DATE: December 29, 2005 /s/ Timothy S. Black
Timothy S. Black
United States
Magistrate Judge

United States District Court
Southern District of Ohio
Western Division

MICHAEL LORIZ, *et al.*,

Plaintiffs,

vs.

JOHN B. CONNAUGHTON, *et al.*,

Defendants.

Case No. 1:05-cv-306

Beckwith, C.J.
Black, M.J.

NOTICE

(Filed Dec. 29, 2005)

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report & Recommendation ("R&R") within **FIFTEEN (15) DAYS** of the filing date of this R&R. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent's objections within **TEN (10) DAYS** after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

United States District Court
Southern District of Ohio
Western Division

MICHAEL LORIZ, *et al.*,

Plaintiffs,

vs.

JOHN B. CONNAUGHTON, *et al.*,

Defendants.

Case No. 1:05-cv-306

Beckwith, C.J.
Black, M.J.

(Filed Dec. 29, 2005)

REPORT AND RECOMMENDATION[1] THAT DEFENDANTS' MOTIONS TO DISMISS (Docs. 14, 19) AND FOR JUDGMENT ON THE PLEADINGS (Doc. 25) BE GRANTED; THAT ALL CLAIMS AGAINST THE NON-MOVING DEFENDANTS BE SUA SPONTE LIKEWISE DISMISSED; AND THAT THIS BE CASE CLOSED.

This civil action is before the Court on defendants' motions to dismiss and for judgment on the pleadings (docs. 14, 19, 25), and the parties' responsive memoranda (docs. 21, 22, 27, 30, 34, 41.) Plaintiffs Michael and Cara Loriz initiated this action on May 4, 2005 by filing a *pro se* complaint against 25 public and private sector individuals, alleging that the Defendants have violated the Plaintiffs' constitutional rights. (Doc. 1.)

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[1] Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

I. BACKGROUND

In 1995, Plaintiffs purchased a 45 acre farm in Butler County, Ohio. (Doc. 1, ¶ 5.) Plaintiffs constructed a 5,000 square foot home, along with a barn and large shed on the property. *Id.* Plaintiffs also established a hardwood veneer tree farm on their property and converted their basement into a professional woodworking shop. (*Id.* at ¶ 9.)

Shortly after Plaintiffs purchased the land, neighboring Defendants Charles Keller and Michael Simmons applied for a zoning variance in order to operate a commercial bird hunting operation on the lot adjacent to Plaintiffs' property. (*Id.* at ¶ 6.) Subsequently, the Ohio Division of Wildlife approved various applications by Keller and Simmons to commence operation of a hunting business, which operations opened in January 2001. (*Id.* at ¶ 11.)

According to Plaintiffs, the Butler County Zoning Department applied for temporary restraining order to halt the operation of the business in March 2001, but the petition was denied. (*Id.* at ¶ 12.)

Accordingly, in March 2001, Plaintiffs filed a civil action in the Court of Common Pleas of Butler County, Ohio, against Keller and Simmons and others, asserting that the operation of the shooting range constituted an unlawful nuisance and claiming further a loss of the quiet enjoyment of their property. (*Id.* at ¶ 14.) This state court litigation remains pending and presents an appropriate forum for the resolution of Plaintiffs' claims.

Plaintiffs further allege that in April 2001, the Butler County Board of Zoning Appeals ("the BZA") found that Keller and Simmons were in violation of county zoning resolutions. (*Id.* at 15.) Nevertheless, on July 17, 2001 and February 23, 2003, the BZA approved conditional use permits to allow the shooting range to continue to operate. (*Id.* at 16.)

Although the BZA established conditions for the shooting range, including requiring a 300 foot buffer zone between the Plaintiffs' property and the range activities (*id.* at 35), Plaintiffs assert compellingly that the BZA-imposed conditions are wholly insufficient to protect Plaintiffs and their property.

Plaintiffs accordingly appealed the decision of BZA to the Butler County Court of Common Pleas, which court remanded the matter to the BZA for further proceedings and ordered the BZA thereafter to submit written findings of fact to the Court of Common Pleas. (Doc. 19, Ex. 3.) On remand, the BZA heard additional testimony, and, following the hearing, the BZA filed "Conclusions of Fact" with the Court of Common Pleas.

On April 11, 2003, the Court of Common Pleas affirmed the BZA's decision. Plaintiffs appealed the decision of the Court of Common Pleas, and, on December 8, 2003, the Ohio Court of Appeals for the Twelfth District affirmed the decision of the Court of Common Pleas upholding the BZA's decision to grant a conditional use permit to operate the shooting range.

On May 4, 2005, Plaintiffs initiated the instant action.

Plaintiffs' principal claim in the instant action is that the Butler County Board of Zoning Appeals and the Ohio courts improperly approved a commercial shooting range to be operated adjacent to Plaintiffs' residence and tree farm. Thus, Plaintiffs' complaint asserts claims against the owners of the shooting range and their attorney, the Ohio Court of Appeals Judges who presided over Plaintiffs' appeal, various Butler County officials, and the Ohio Wildlife Division Chief.[2]

Plaintiffs are seeking compensatory damages, as well as declaratory and injunctive relief. Specifically, Plaintiffs' prayer for relief seeks the following:

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[2] The named defendants include: the operators of the commercial shooting range, Charles Keller, Christopher Keller, Michael Simmons, and Ridge Wind Quail Hunts, LLC, and their attorney, John B. Connaughton; the members of the Butler County Board of Zoning Appeals, Lee Steenken, Thomas Bevington, Gary Salman, John Zboril, Walt Filpot, and Alan Daniel; the Butler County Commissioners, Michael A. Fox, Gregory Jolivette, and Charles R. Furmon; and Judges of the Ohio Court of Appeals for the 12th Appellate District, the Honorable Anthony Valen, the Honorable William W. Young, and the Honorable Steven W. Powell; Butler County Warrant Officer, Thomas Turner; Butler County Sheriff, Richard K. Jones; Butler County Chief Deputy Sheriff, Anthony E. Dwyer; Butler County Prosecuting Attorney, Robin Piper; Butler County Assistant Prosecuting Attorney, Roger Gates; Butler County Chief Zoning Inspector, William Balinsinger; Butler County Zoning Inspector, James M. Fox; and Ohio Department of Natural Resources Wildlife Division Chief, Steven A. Gray.

1. Declaratory judgment establishing that the BZA approval of the subject shooting range was unlawful and unconstitutional and a permanent injunction against the BZA from permitting shooting range operations as conditional uses in the A-1 zone.

2. Permanent injunction against defendant Gray from permitting any shotgun shooting operations, public or private, including the subject shooting range;

3. A diligent and thorough investigation by the United States Attorney into corrupt practices within the Butler County Sheriff, Prosecutor, Judicial, and Executive departments;

4. Defendants pay Plaintiffs fair market value (prior to the shooting range) for residence and property, and assume all liability for lead contamination of Plaintiffs' property;

5. Money damages (incidental and punitive) in the amount of $10,000,000.

5. (sic) Any further relief the Court deems appropriate. (Doc. 1, p. 12.)

Defendants Valen, Young, Powell and Connaughton have filed a motion to dismiss (doc. 14), and Defendants Keller, Keller, Simmons, and Ridge Wind Quail Hunts, L.L.C. have filed a motion to dismiss (doc. 19), and Defendant Steven A. Gray has filed a motion for judgment on the pleadings (doc. 25). The

briefing of these motions is complete, and each motion will be addressed in turn.

II. STANDARDS OF REVIEW

A.

On consideration of a motion to dismiss under Rule 12(b)(1), the Court must take all material allegations in the complaint as true, and the Court shall construe all of the allegations in the light most favorable to the non-moving party. *See United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir.), *cert. denied,* 513 U.S. 868 (1994).

Because Plaintiffs brings this case *pro se,* the Court liberally construes their allegations in their favor. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see also Williams v. Browman*, 981 F.2d 901, 903 (6th Cir. 1992) (*pro se* pleadings should be construed more liberally than pleadings drafted by lawyers). Indeed, "[a] pro se plaintiff's complaint is held to an especially liberal standard, and should only be dismissed for failure to state a claim if it appears 'beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000) (quoting in part *Estelle*, 429 U.S. at 106). The Court, however, "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

Where subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. *Moir v. Greater Cleveland Reg'l Trans. Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). "[T]he court is empowered to resolve factual disputes when subject matter jurisdiction is challenged." *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 918 (6th Cir. 1986). In resolving a factual jurisdictional issue under a Rule 12(b)(1) motion, the Court addresses the jurisdictional issue in the same manner as summary judgment issues, in that the moving party must demonstrate the absence of a genuine issue of jurisdictional fact. *Armbruster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

B.

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Where, as here, a motion for judgment on the pleadings is based on the argument that the complaint fails to state claim upon which relief may be granted, the Rule 12(c) motion is judged under the same standard of review as a Rule 12(b)(6) motion. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987).

III. ANALYSIS

A. Plaintiffs' Claims Under the Takings Clause Are Not Ripe And Should Be Dismissed Without Prejudice.

The central theme of Plaintiffs' complaint is that the approval and operation of the shooting range resulted in a taking of their property in violation of the Fifth Amendment. Their claim is essentially one of inverse condemnation.

However, all plaintiffs are required to first exhaust state administrative remedies for inverse condemnation, prior to filing a [sic] action under 42 U.S.C. § 1983. That is, "[i]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnston City,* 473 U.S. 172, 195 (1985); *see also Dawkins v. City of Utica,* 1997 WL 176328, *7 (N.D.N.Y. 1997) ("As to plaintiff's takings claim, the court *sua sponte* conditionally dismisses that claim because it is not ripe.")

In *Williamson County,* the U.S. Supreme Court held that § 1983 claims based on alleged violations of the takings clause are not ripe until the plaintiff has either exhausted state law remedies for seeking just compensation for the alleged taking, or demonstrated that the state law procedures are inadequate. *Williamson County, supra,* 473 U.S. at 195; *see also*

Hammond v. Baldwin, 866 F.2d 172, 179 (6th Cir. 1989) ("The plaintiffs have a state remedy to address the alleged damage to their property; and a suit under 42 U.S.C. § 1983 is inappropriate until a final decision of the state in an inverse condemnation action is entered against the plaintiffs.").

Because the Plaintiffs have not availed themselves of state-provided remedies by pursuing and completing a state court action seeking just compensation for the alleged inverse condemnation of their property, their instant action for claims of an unconstitutional takings is not yet ripe for adjudication. *Cap'n Hook Auto Parts Inc., v. Liverpool Township*, 773 F.Supp. 71, 74 (N.D. Ohio 1991); *Williamson*, 473 U.S. at 195.

Moreover, "**[i]f a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised sua sponte if not raised by the parties.**" *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 157 (6th Cir. 1992) (quoting *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990)) (emphasis supplied).

Accordingly, Plaintiffs' Fifth Amendment takings claims should be dismissed *sua sponte* without prejudice.

B. The Motion to Dismiss of Judges Anthony Valen, William Young, and Stephen Powell, and Attorney John B. Connaughton (Doc. 14) Should Be Granted.

Defendants Valen, Young and Powell, Judges of the Ohio Court of Appeals for the 12th Appellate District, presided over Plaintiffs' appeal of the decisions of the BZA and the Court of Common Pleas.

Plaintiffs allege that as a result of the proceedings before the Twelfth District Court of Appeals, the Judges violated the Plaintiffs' rights under the First, Fifth, and Fourteenth Amendments. Plaintiffs further allege that the Judges are all senior members of the Republican Party, that the zoning appeal "was effectively a political, rather than judicial, proceeding," that the Judges acted outside their judicial capacity, and that "the decision of the Judges places them in direct violation of Ohio Revised Code pertaining to firearms discharge."

As to Defendant Connaughton, Plaintiffs allege that his illegal conduct has resulted in the deprivation of Plaintiffs' First and Fifth Amendment rights. (*Id.* at ¶ 19.) Connaughton is a part-time county judge and a practicing attorney. Connaughton acted as an attorney for the shooting range operators during the zoning proceedings before the BZA. (Doc. 1, ¶ 16.) Plaintiffs allege, *inter alia*, that by acting as an attorney while at the same time serving as a part-time Ohio county judge, Connaughton breached an ethical of [sic] duty imposed by the Ohio Revised Code, the Code of Judicial Conduct, and Ohio's Code of Professional

Responsibility. Plaintiffs further assert that Connaughton repeatedly perjured himself before the BZA, and made false statements to the common pleas and appellate courts. (*Id.* at ¶ 17.) Additionally, Plaintiffs assert that Connaughton witnessed his clients shoot maliciously into Plaintiffs' property.

i. Under the Rooker-Feldman Doctrine, the Court Lacks Jurisdiction over Plaintiffs' Claims Against the Defendant Judges and John Connaughton.

Under 28 U.S.C. § 1257, final judgments of state courts are entitled to receive full faith and credit from this Court, and the subordinate federal courts do not have jurisdiction to review these final judgments of state courts because the review of such determinations can be obtained only by the United States Supreme Court by writ of certiorari. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923) (an appeal through the state courts to the U.S. Supreme Court is the exclusive means by which a state court judgment may be reviewed for constitutional error); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 483-84 n.6 (1983). As noted in *Feldman*:

> Lower federal courts possess no power whatever to sit in direct review of state court decisions. If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial [of the claim] in a judicial proceeding . . .

> then the district court is in essence being called on to review the state court decision. This the district court may not do.

Feldman, 460 U.S. at 483-84 n.6.

Thus, pursuant to the *Rooker-Feldman* doctrine, district courts lack jurisdiction over challenges to the constitutionality of judicial acts in the courts of the several states.

Here, Plaintiffs are seeking a declaratory judgment setting aside the state courts' decisions regarding the zoning of the shooting range. Such action is expressly prohibited by the *Rooker-Feldman* doctrine, and, as a result, this Court lacks subject matter jurisdiction over Plaintiffs' claims.

ii. Defendant Judges Have Absolute Immunity Barring Plaintiffs' Claims for Monetary Relief.

Furthermore, the defendant Judges are absolutely immune from individual liability for monetary relief for the performance of any "judicial act" unless there is a "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U S. 349, 362 (1978); *King v. Love*, 766 F.2d 962, 966-67 (6th Cir. 1985). Judicial immunity is properly invoked unless a judge "knows he lacks jurisdiction or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction." *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980).

In examining the functions normally performed by a judge, the Court of Appeals for the Sixth Circuit has recognized that "paradigmatic judicial acts," or acts that involve resolving disputes between parties who have invoked the jurisdiction of a court, are the touchstone for application of judicial immunity. *Johnson v. Belskis*, 2005 WL 2416557, *8 (S.D. Ohio 2005) (citing *Barrett v. Harrington*, 130 F.3d 246, 255 (6th Cir.1997)).

Here, each of the judges acted in his judicial capacity with regard to the plaintiffs when presiding over the zoning appeal. The judges sat on a three-judge panel and ruled on Plaintiffs' appeal from the decision of the trial court (and the BZA). Moreover, Plaintiffs were parties in the zoning litigation and dealt with the judges in connection with that litigation. Thus, because presiding over cases is a function normally performed by a judge, and because Plaintiffs dealt with each of the judges in his judicial capacity, the judges' acts were judicial in nature. Accordingly, Plaintiffs' claims against the judges are barred because the judges enjoy absolute immunity.

iii. Plaintiffs' Complaint Fails to State a Claim Against the Defendant Judges and Defendant Connaughton.

42 U.S.C. § 1983 provides a civil cause of action to any citizen of the United States against any person who, under color of state law, deprives the citizen of "any rights, privileges, or immunities secured by the

Constitution and laws of the United States." *See Christy v. Randlett,* 932 F.2d 502, 504 (6th Cir.1991) (citations omitted).

Thus, to succeed on a § 1983 claim, a plaintiff must prove two elements: (1) that he was deprived of a right secured by the Federal Constitution or laws of the United States; and (2) that he was subjected to this deprivation by a person acting under the color of state law. *See Searcy v. City of Dayton,* 38 F.3d 282, 286 (6th Cir.1994). "By its terms, § 1983 creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." *Gardenhire v. Schubert,* 205 F.3d 303, 310 (6th Cir.2000) (citing *Oklahoma v. Tuttle,* 471 U.S. 808 (1985)).

Here, Plaintiffs claim violations of various constitutional rights (*e.g.*, violations of the takings clause of the Fifth Amendment and violations of the due process clauses of the Fifth and Fourteenth Amendments). However, Plaintiffs do not allege that the Defendant Judges and/or Defendant Connaughton deprived Plaintiffs of a federally protected right.

As noted above, Plaintiffs allege that the Judges improperly decided the appeal of the decisions of the BZA and the Butler County Court of Common Pleas and that these rulings resulted in constitutional violations. Accordingly, Plaintiffs' claims against the Defendant Judges fail as a matter of law under § 1983 because such claims are barred on the basis of absolute judicial immunity. *See Johnson v. Belskis,* 2005 WL 2416557, *7 (S.D. Ohio 2005).

Furthermore, with respect to defendant Connaughton, Plaintiffs assert that he breached his ethical duty imposed by the Ohio Revised Code, the Ohio Code of Judicial Conduct, and the Ohio Code of Professional Responsibility by acting as an attorney while at the same time serving part-time as an Ohio county judge. Plaintiffs do not allege that defendant Connaughton's conduct in representing the shooting range operators deprived Plaintiffs of a federally protected right. Moreover, Plaintiffs make no allegation that defendant Connaughton was acting under color of law when he was representing the shooting range operators.

Under Ohio law, defendant Connaughton did not act unlawfully by acting as an attorney during his term as a part-time Ohio county judge. Pursuant to the Ohio Revised Code:

> A judge of a county court shall be disqualified from the practice of law only as to a matter pending or originating in that county court during the judge's term or office. . . .

Ohio Rev. Code. Ann. § 1907.16(B).

Additionally, Plaintiffs' allegations relating to defendant Connaughton's actions cannot result in civil liability under the Ohio Code of Judicial Conduct or the Ohio Code of Professional Responsibility. *See Code of Judicial Conduct Preamble* ("[The Judicial Code] is not designed or intended as a basis for civil liability or criminal prosecution."); *see also Fred Siegel Co., v. Arter & Hadden*, 85 Ohio St.3d 171

(1999) (a violation of the disciplinary rules does not, in itself, create a private cause of action.).

In any event, the allegations in Plaintiffs' complaint fail to establish that defendant Connaughton was acting under color of law and/or that he deprived Plaintiffs of a federal right.

Accordingly, Plaintiffs' claims against the defendant Judges and attorney Connaughton should be dismissed.

C. The Motion to Dismiss of Defendants Keller, Keller, Simmons and Ridge Wind Quail Hunts, LLC (Doc. 19) Should Be Granted.

Plaintiffs' complaint alleges that the operation of a bird hunting business by defendants Keller, Keller, Simmons, and Ridge Wind Quail Hunts, L.L.C. (hereinafter the "Ridge Wind Defendants") amounted to a Fifth Amendment taking and deprived Plaintiffs of their property. Plaintiffs' further assert that the Ridge Wind Defendants and others conspired to deny Plaintiffs their due process rights under 42 U.S.C. § 1983.

i. *Rooker-Feldman*

As noted above, the *Rooker-Feldman* doctrine "bars re-litigation of claims raised in state court proceedings as well as claims that are 'inextricably intertwined' with the claims asserts there." *Pieper v. Am. Arbitration Ass'n*, 336 F.3d 458, 460 (6th Cir.

2003). Moreover, "[w]here federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive that the federal proceeding is, in substance, anything other than a prohibited appeal of the state-court judgment." *Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998).

Here, Plaintiffs' complaint is seeking a "declaratory judgment establishing that the BZA approval of the shooting range and Judge Stapelton's ruling in support of the BZA were unlawful and unconstitutional." (Doc. 1 at ¶ 59.) However, the Ohio Court of Appeals for the Twelfth District affirmed the decision granting the Ridge Wind Defendants a conditional use permit, and, accordingly, the *Rooker-Feldman* doctrine bars this Court from re-litigating the decision reached by the Ohio Court of Appeals.

ii. *Plaintiffs' Complaint Fails to State a Claim for Conspiracy under 42 U.S.C § 1983.*

Plaintiffs assert that *Rooker-Feldman* is inapplicable because the state appellate court did not address the issue of whether the Ridge Wind Defendants were damaging Plaintiffs' property and depriving them of civil rights. However, even assuming that *Rooker-Feldman* does not preclude this Court from exercising jurisdiction, dismissal under 12(b)(6) is still warranted because the Ridge Wind Defendants are not state actors and the complaint fails to state a claim for conspiracy under 42 U.S.C. § 1983.

As noted above, in order to establish liability under 42 U.S.C. § 1983, the Plaintiffs must prove that they were deprived of rights secured by the Constitution by a person acting under color of state law. *See Searcy, supra,* 38 F.3d at 286. "The principal inquiry in determining whether a private party's actions constitute state action under the Fourteenth Amendment is whether the party's actions may be fairly attributable to the state." *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir. 1992). Here, it is undisputed that the Ridge Wind Defendants are not state actors.

However, Plaintiffs further assert that the Ridge Wind Defendants conspired with "others" to deny Plaintiffs their due process rights.

Private persons may be held liable under § 1983 if they willfully participate in a joint action with state agents. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Cooper v. Parrish*, 203 F.3d 937, 952 n.2 (6th Cir.2000); *Moore v. City of Paducah*, 890 F.2d 831, 834 (6th Cir.1989); *Hooks v. Hooks*, 771 F.2d 935, 943 (6th Cir.1985).

However, a complaint alleging that a private party is liable under § 1983 for conspiracy with a state actor "must be pled with some degree of specificity. . . . [V]ague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir.1987).

The Sixth Circuit has repeatedly held that "general" allegations of a conspiracy are insufficient to withstand a motion to dismiss. Recently, the Sixth Circuit dismissed a claim raising allegations similar to those in Plaintiffs' complaint:

> Plaintiffs have not asserted any facts to show that his conduct can be characterized as fairly attributable to the state under any of the tests articulated in *Tennessee Area Local,* 361 F.3d at 905. Nor have they alleged any specific facts to show that [the defendant's] involvement in the civil litigation and the criminal prosecution of [the plaintiff] was a cooperative or joint effort with state actors to deprive Plaintiffs of their civil rights. Other than general allegations of conspiracy to cause and influence a wrongful criminal prosecution, Plaintiffs make no allegations of joint, concerted activity to deprive Dallas of his civil rights.

Dallas v. Holmes, 2005 WL 1313801, at *5 (6th Cir. 2005).

Thus, simply stating in the complaint that a conspiracy was present is not enough to survive a Rule 12(b)(6) motion. *See, e.g., Spadafore v. Gardner*, 330 F.3d 849, 853 (6th Cir. 2003) (dismissing complaint because it lacked "the requisite degree of specificity"); *Morris v. Boyd*, 39 Fed. Appx. 281, 283-84 (6th Cir. 2002) (dismissing claim alleging conspiracy between police officer and social worker who each allegedly gave false testimony, as plaintiff had not alleged an agreement between the two to do so);

Young v. Gundy, 30 Fed. Appx. 568, 569 (6th Cir. 2002) (dismissing complaint where it contained only a "bare assertion of a conspiracy" but lacked factual support for such an assertion); *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 541 (6th Cir. 2002) (dismissing deficient complaint because "vague and conclusory allegations unsupported by material facts are insufficient to sustain a conspiracy claim under § 1983").

Here, Plaintiffs' complaint contains vague and conclusory allegations implying that a conspiracy existed. Moreover, Plaintiffs have not alleged any agreement and/or a joint concerted effort between the Ridge Wind Defendants and any state actor to deprive Plaintiffs of their civil rights. *Cf.* Doc. 1 ¶¶ 34 & 47.

Accordingly, Plaintiffs' conspiracy allegations are properly dismissed.

iii. Plaintiffs Cannot State a Claim for Failure of State Officials to Prosecute the Ridge Wind Defendants.

In their memorandum *contra* to the Ridge Wind Defendants' motion to dismiss, Plaintiffs argue that their due process rights were violated by the failure of state officials to prosecute the Ridge Wind Defendants. (Doc. 27, p. 11). However, the Fourteenth Amendment does not provide the right to have another individual prosecuted. *See Town of Castle Rock v. Gonzales*, 125 S.Ct. 2796, 2810 (2005) ("the benefit

that a third party may receive from having someone else arrested . . . generally does not trigger protections under the Due Process Clause.")

Accordingly, Plaintiffs' allegations against the Ridge Wind Defendants fail to state a claim upon which relief can be granted, and the Ridge Wind Defendants' motion to dismiss should be granted.

D. The Motion for Judgment on the Pleadings of Defendant Steven A. Gray (Doc. 25) Should Be Granted.

Plaintiffs' complaint alleges that defendant Gray, as Chief of the Division of Wildlife of the Ohio Department of Natural Resources, issued various permits to the Ridge Wind Defendants with "no provision for public comment or any regard for the public safety, and are in accordance with neither State Law nor the chief's own regulations for safe operation." (Doc. 1 ¶ 49.)

Plaintiffs further allege that defendant Gray has "wrongfully failed to meaningfully investigate the range, correct any of the problems, or in any [sic] require the range to come into compliance with its own departments' regulations of State law." (*Id.* at ¶ 52.) Thus, Plaintiffs' contention is that defendant Gray's issuance of permits and licenses violated their Fourteenth Amendment Due Process rights and resulted in an unlawful taking in violation of the Fifth Amendment. (*Id.* at ¶ 53.)

Here, the crux of the allegations against Defendant Gray is that his actions resulted in an unlawful taking of Plaintiffs' property. However, as noted above, because a violation of the takings clause does not occur until just compensation has been denied, *see Williamson County,* 473 U.S. at 194 n.13, Plaintiffs must use available state procedures to seek such compensation before they may bring a § 1983 takings claim in federal court. *John Corp. v. City of Houston,* 214 F.3d 573, 581 (5th Cir. 2000).

Moreover, although Plaintiffs also allege substantive and procedural due process violations, these claims are ancillary to the main issue (whether the granting of the permits and licenses constitutes a taking of the property) and, therefore, are not ripe for review at this time. *See Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 160 (6th Cir.1992) ("Until the state courts have ruled on the plaintiffs' inverse condemnation claim, this court cannot determine whether a taking has occurred, and thus cannot address the procedural due process claim with a full understanding of the relevant facts.").

Accordingly, defendant Gray's motion for judgment on the pleadings (doc. 25) should be granted.

IV.

Based on the foregoing, the undersigned **RECOMMENDS** that defendants' motions to dismiss (docs. 14 and 19) and for judgment on the pleadings (doc. 25) should be **GRANTED**; and defendants

Anthony Valen, William Young, Stephen Powell, John Connaughton, Charles Keller, Christopher Keller, Michael Simmons, Ridge Wind Quail Hunts, LLC, and Steven A. Gray should be **TERMINATED** as party defendants in this action.

Moreover, although defendants Steeken, Bevington, Salman, Turner, Gates, Balsinger, J. Fox, Zboril, Filpot, Daniel, M. Fox, Jolivette, Furmon, Dwyer, Jones, and Piper have not sought dismissal of the complaint, it is manifest that Plaintiffs' Fifth Amendment takings claims, and the ancillary procedural and substantive due process claims, and the conspiracy claims must fail for the same reasons that they cannot succeed against defendants Anthony Valen, William Young, Stephen Powell, John Connaughton, Charles Keller, Christopher Keller, Michael Simmons, Ridge Wind Quail Hunts, LLC, and Steven A. Gray (*i.e.*, Plaintiffs' takings claims are not ripe for adjudication, *see Williamson County*, and Plaintiffs' conspiracy allegations lack specificity, *see Spadafore*).

Under these circumstances, "[a] District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of the moving defendants." *Silverton v. Department of the Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981); *see also Muhammad v. State of Louisiana*, 2000 WL 1511181, at *4, 6 (E.D. La. Oct. 6, 2000); *Lesher v. Lavrich*, 632 F.Supp. 77, 84 (N.D. Ohio 1984) (citing *Silverton*).

IT IS THEREFORE FURTHER RECOMMENDED THAT the complaint be **DISMISSED** for failure to state a claim upon which relief can be granted and that the action be **TERMINATED** in toto.

In sum, the undersigned **RECOMMENDS THAT**:

1. The Motion to Dismiss of Judges Anthony Valen, William Young, and Stephen Powell, and Attorney John B. Connaughton (doc. 14) be **GRANTED**;

2. The Motion to Dismiss of Defendants Keller, Keller, Simmons and Ridge Wind Quail Hunts, LLC (doc. 19) be **GRANTED**;

3. The Motion for Judgment on the Pleadings of Defendant Gray (doc. 25) be **GRANTED**;

4. Plaintiff's Fifth Amendment takings claims, and all ancillary claims thereto, be **DISMISSED *without prejudice***; and

5. All pending motions be **DENIED as MOOT**, and this matter **CLOSED**.

DATE: December 29, 2005

s/ Timothy S. Black
Timothy S. Black
United States
Magistrate Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

IN RE:	:	CASE NO.
	:	CA2003-04-100
APPLICATION OF	:	
CHARLES E. KELLER.	:	OPINION
	:	12/8/2003
	:	

CIVIL APPEAL FROM BUTLER
COUNTY COURT OF COMMON PLEAS
Case No. CV01-04-0714

Thompson Hine LLP, Charles E. Ticknor III, Paul Giorgianni, Craig A. Calcaterra, 10 West Broad Street, Suite 700, Columbus, Ohio 43215-3435, for appellants, Michael and Cara Loriz.

J.B. Connaughton, 2332 Morman Road, Hamilton, Ohio 45013, for appellee, Charles E. Keller.

Robin N. Piper, Butler County Prosecuting Attorney, Roger S. Gates, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for appellee, Butler County Board of Zoning Appeals.

VALEN, P.J.

{¶1} Appellants, Michael and Cara Loriz, appeal the decision of the Butler County Court of Common Pleas affirming the decision of appellee, Butler County Board of Zoning Appeals ("BZA"), granting appellee, Charles Keller ("Keller"), a conditional use permit to

operate a commercial hunting range. We affirm the decision of the lower court.

{¶2} In July 1995, appellants purchased 45 acres of property in Butler County adjacent to Keller's property. Appellants built a 5,000 square foot home on the property.

{¶3} In September 1995, Keller approached appellants and informed them of his intention to open a commercial hunting range on his property with his business partner, Michael Simmons ("Simmons"). However, Keller's financial backers reconsidered and the commercial hunting range was not opened.

{¶4} In 2001 Keller erected a sign advertising his business, Ridgewind Quail Farm. Keller raises pheasants, quail, partridge and ducks and allows hunters to hunt the farm-raised birds. On February 28, 2001, Keller was cited for running a commercial hunting business on his property. The BZA affirmed the violation order. Keller then applied to the BZA for a conditional use permit to operate a commercial hunting range on his property. A hearing was held on July 17, 2001. The BZA granted the conditional use permit with several conditions.

{¶5} Appellants appealed the granting of the conditional use permit to the Butler County Common Pleas Court. The common pleas court remanded the matter to the BZA with orders to hear additional testimony and to submit written findings of fact to the common pleas court. The BZA heard additional evidence on February 4, 2003. Following the hearing,

the BZA filed "Conclusions of Fact" with the common pleas court.

{¶6} On April 11, 2003, the common pleas court affirmed the BZA's decision to grant Keller a conditional permit for a commercial hunting range. Appellants appeal the common pleas court's decision raising two assignments of error:

{¶7} Assignment of Error No. 1:

{¶8} "THE JULY 17, 2003[SIC] BZA HEARING WAS NOT CONDUCTED IN ACCORDANCE WITH OHIO LAW."

{¶9} Appellants argue that the July 17, 2001 hearing was not conducted as an adjudicatory hearing. Appellants maintain that "the hearing was conducted as a non-evidentiary, public political meeting, at which any member of the public could speak, regardless of whether he or she possessed information relevant to the BZA's decision." Therefore, appellants maintain that it was improper to "rely on subjective and unsubstantiated opinions, unsworn testimony, and testimony not subject to cross-examination."

{¶10} The transcript indicates that all witnesses except for two were sworn at the July 17, 2001 hearing. The two witnesses not sworn were attorneys. The Board stated that as officers of the court, "it's not necessary to swear you in." However, appellants never requested that witnesses be sworn in. The "omission of administration of the oath to a witness in a trial or administrative hearing is a waivable error."

Dudukovich v. Lorain Metro. Housing Auth. (1979), 58 Ohio St.2d 202, 206. Where there is no objection to the admission of unsworn testimony at an administrative hearing, any error allowing such evidence is waived and the court must then consider the unsworn testimony as though it were given under oath. *Zurow v. Cleveland* (1978), 61 Ohio App.2d 14, syllabus. Furthermore, if timely objection is not made "this error is waived throughout the entire proceeding, including the appellate level." *Id.* Since appellants did not object to the witnesses that were not sworn in, appellants have waived this issue.

{¶11} Appellants also argue that they were not permitted to cross-examine witnesses. However, they never asked to cross-examine witnesses during the proceedings before the BZA. Failure to request cross-examination of a witness acts as a waiver. *Kandell v. City Council of Kent* (Aug. 2, 1991), Portage App. No. 90-P-2255. Inasmuch as appellants did not "raise the issue of cross-examination during the proceedings before the [BZA], they waived their rights to claim these errors in an appeal to the Common Pleas Court * * * and subsequently to this court." *Zurow* at 24.

{¶12} Appellants also argue that they were "limited in presenting evidence in ways Keller was not." As an example, appellants argue that their "testimony was limited to five minutes." However, a review of the record demonstrates that Michael Loriz stated at the hearing, "I'd like to, within five minutes if I can, try to give you a little background of the entire-six-year history of my involvement with the

case and then go into the safety aspects which I think are very critical from my-from my standpoint." When Loriz concluded he was asked, "do you have any concluding remarks?" Loriz responded, "thank you very much for your time and consideration. And I would ask that you deny this request that's before you." Furthermore, after Simmons testified before the BZA, Loriz was allowed to offer a rebuttal of statements made by Simmons. We find that the appellants were not limited in presenting evidence.

{¶13} The common pleas court found, "after careful consideration of the evidence, [that] the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record." A court of appeals is required to affirm the decision of a common pleas court in an appeal of an administrative decision "unless the court of appeals finds, as a matter of law, that the decision of the Common Pleas Court is not supported by a preponderance of reliable probative and substantial evidence." *Dudukovich*, 58 Ohio St.2d at 207.

{¶14} Having examined the record, this court finds that appellants have waived any errors regarding unsworn testimony and testimony not subjected to cross-examination. Furthermore, appellants were not limited in presenting evidence. The decision of the common pleas court is supported by a preponderance of reliable probative and substantial evidence, and the common pleas court did not abuse its discretion in finding as it did. The first assignment of error is overruled.

{¶15} Assignment of Error No. 2:

{¶16} "THE COURT OF COMMON PLEAS ERRED IN UPHOLDING THE CONDITIONAL USE PERMIT TO OPERATE A COMMERCIAL HUNTING RANGE BECAUSE THE BZA'S DECISION WAS UNREASONABLE AND UNSUPPORTED BY THE PREPONDERANCE OF SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE."

{¶17} Appellants argue that "even if the Common Pleas Court were permitted to consider the unsworn and uncross-examined [sic] evidence submitted at the July 17, 2001 hearing, the court still erred in upholding the BZA's decision because Keller's evidence was overwhelmed by the evidence submitted by the Lories."

{¶18} A common pleas court should not substitute its judgment for that of an administrative board, such as the board of zoning appeals, unless the court finds that there is not a preponderance of reliable, probative and substantial evidence to support the board's decision. *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34. Furthermore, the common pleas court "must give due deference to the administrative agency's resolution of evidentiary conflicts." *Budd Co. v. Mercer* (1984), 14 Ohio App.3d 269, 273-4. The common pleas court found, "after careful consideration of the evidence, [that] the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record."

{¶19} An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, rehearing denied (1993), 67 Ohio St.3d 1439. In *Pons*, the Ohio Supreme Court noted:

{¶20} "While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court. The appellate court is to determine only if the trial court has abused its discretion, i.e., being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. Absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its judgment for [that of an administrative agency] or a trial court. Instead, the appellate court must affirm the trial court's judgment." *Id. See, also, Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.* (Sept. 24, 1992), Franklin App. No. 91AP-1493, motion to certify overruled, 66 Ohio St.3d 1459. After reviewing the common pleas court's decision, we find that the lower court did not abuse its discretion as there was evidence in the BZA findings supporting its decision.

{¶21} Appellants also argue that the transcripts of the hearing are inaccurate as words are "randomly misstated and omitted ." Therefore, appellants argue that the decision should be vacated and remanded for a new hearing so that an accurate record of testimony can be made.

{¶22} Pursuant to R.C. 2506.03, which deals with the hearing of an appeal from an administrative decision, "[t]he hearing of such an appeal shall proceed as in trial of a civil action, but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that "[t]he transcript does not contain a report of all evidence admitted or proffered by the appellant."

{¶23} We have reviewed the transcripts and found that the gaps are not so extensive that the gist of the arguments and testimony cannot be ascertained. *Franklin Twp. v. Marble Cliff* (1982), 4 Ohio App.3d 213, 216. *See, also, BP Oil Co. v. Dayton Bd. of Zoning Appeals* (1996), 109 Ohio App.3d 423, 436. Consequently, the second assignment of error is overruled.

{¶24} Judgment affirmed.

YOUNG and POWELL, JJ., concur.

COURT OF COMMON PLEAS

Butler County

Michael Loriz, et al Plaintiffs Vs Charles E. Keller, et al Defendants	Case No. CU [sic] 2001-04-0714 ENTRY: (Filed April 11, 2003)

This matter came on for hearing on the appeal of the Plaintiffs/Appellants, Michael Loriz and Cara Loriz from the final decision of the Zoning Board of Appeals of Butler County, Ohio, issued on July 26, 2001, and the amended decision issued February 19, 2003, granting a variance to Defendants/Appellees Charles E. Keller regarding his property located at 6508 State Road, Somerville, Ohio, 45064, permitting a commercial bird shooting preserve.

Section 2506.04 of the Ohio Revised Code sets forth the standard of review that the Court must apply. The Court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. The Court may affirm, reverse, vacate or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions, or decision with the finding or opinion of the Court.

The Court must weigh the evidence in the record, and whatever additional evidence was permitted pursuant to statute to determine whether there exists a preponderance of reliable, probative and substantial evidence to support the agency decision. This does not mean, however, that the Court may blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise. (Dudukovich v. Housing Authority, 58 OS 2nd 202

This Court, after careful consideration of the evidence finds that the Board of Zoning Appeals' decision is supported by a preponderance of substantial, reliable and probative evidence on the record.

It is therefore the order of this Court that the decision of the Butler County Board of Zoning Appeals is affirmed.

This Court further finds that this is no just cause for delay and this is a final appealable order.

This Court further finds that the previous stay order issued by this Court is hereby vacated.

Costs to Plaintiffs.

/s/ William B. Stapleton
Judge William B. Stapleton

No. 06-3427

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL HANNING LORIZ, et al., Plaintiffs-Appellants, v. JOHN B. CONNAUGHTON, et al., Defendants-Appellees.	ORDER (Filed Sept. 4, 2007)

BEFORE: MERRITT and MARTIN, Circuit Judges; and FORESTER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. Karl S. Forester, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk [/s/ Illegible]

No. 06-3427

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF OF APPELLANTS

MICHAEL H. LORIZ
CARA F. LORIZ
Pro se Appellants
11 Marc Street
Shelter Island, NY 11964

EXCERPTED CONTENTS

* * *

STATEMENT OF FACTS

The Loriz family purchased 45 acres in Butler County, Ohio and built a 5,000+ square-foot custom home and outbuildings in 1995. We reforested much of our property and improved mature stands of hardwood trees under a stewardship program administered by the State of Ohio. Our basement was converted into a professional-level woodworking shop, and a family wood business was incorporated. We invested nearly all of our assets in the home and property and it was valued, before shooting operations commenced, at $700,000. (R.1 ¶5, 9, 24)

First shotgun-fire invasions

Five years later, large-scale shooting events ensued adjacent to the Loriz residence. Up to 1,000 rounds of 12-gauge shotgun projectiles were fired daily, as close as 300 feet from our house with no restrictions on shot direction. Members of our family could not exit our house for fear of injury by lead projectile. (R.1, ¶11)

The Loriz family discovered that shooting events were State authorized. The State provided no notice or inspection prior to granting the permits and no appeal process after. A required County variance had not been sought.

The County filed a TRO against the shooting operations in state court to halt violations of County zoning law. Mr. Connaughton, a sitting Butler County judge and shooting enthusiast, appeared for the Shooters prompting our first attorney[8] to put his head in his hands and say, "Oh, no." The TRO was denied and we vacated our property during subsequent shoots. We filed a state civil suit against the Kellers, Mr. Simmons and a shooting club. (R.1 ¶12,14)

The County BZA ruled that the Shooters violated the Zoning Resolution in April 2001. The operators subsequently applied to the County for a conditional

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[8] The Loriz family hired and fired 6 attorneys during the administrative appeal process. None of the attorneys were able to zealously represent us against a sitting county judge and county prosecutorial officers.

use permit to operate a commercial recreational facility in the A-1 zone. As we discovered later, no such permit exists in county law. The County eventually granted the illegal permit. (R.1 ¶15,16)

Harm from acknowledged shot trespass – "a bunch of hooey"

Over the past five years, defendants repeatedly acknowledged shot trespass (exhibits to R.63 and elsewhere) as shown in the table below. Testimony is in response to claims that shot entering our property is a threat to the Loriz family.

Testimony acknowledging that shot enters the Loriz property

Connaughton	County judge representing the Shooters in county and state hearings
At BZA hearings [R.63 Exhibit E1, E3, E4]	I'm not going to say that shot isn't going to rain, and I use that literally . . . 2-4-03 Obviously, nobody wants to be hit in the face no matter what distance, you know, if you have a pellet hit you in the eye it could and probably would cause damage. 7-17-01 . . . because of the dense foliage, because of the [Loriz] forest, *there is no safety problem.* 4-17-01

To the 12th Appellate Court [Ex.E2]	The Court: What is the evidence as to the . . . Fall zone? Mr. Connaughton: . . . *1,100 feet. Now that's pretty long.* 10-7-03
C. Keller	Shooter

* * *

At the BZA Annual review [Ex.C2]	. . . if you want to get into the Revised Code, it actually tells you that you're not allowed to shoot in[to] . . . anybody's property. *That means it's impossible to shoot* . . . unless you're shooting straight up in the air or straight down at the ground. . . . 5-17-05
Simmons	Shooter
In deposition presented to BZA on 2/04/03 [Ex.D]	Q: . . . you would instruct your family just to not be in the back part of the property when hunting activities are going on . . . ? A: *Or to wear hunter's orange.* 12-10-02
Balsinger	County officer
Statements at BZA annual review hearing [Ex.C2]	I'd be willing to stand over at the Loriz's property and let you stand there at that fence and let you shoot the shotgun at me, *not in my face*, in my back and I guarantee you you're not going to hurt me . . . That's how much ***I think this is a bunch of hooey***. 5-17-05

Deposition testimony, *supra*, and other shot trespass evidence were submitted to the State (see affidavits, R.34). The State and County have known for years that shot trespasses; no one has refuted it. Officials have chastised us for complaining about it (*supra*).

During the first BZA hearing on the Shooters' zoning application, attorney Connaughton testified to all evidence in support. He told the BZA that his client already possessed State approval to operate a commercial shooting range, a false statement. The BZA approved the application conditioned upon a 300-foot setback from our property, proper state licensing and an annual review to address neighbor problems. The BZA was added to the state civil suit. (R.1 ¶17-19)

The industry standard setback established by the NRA (Michael Loriz is a lifetime NRA member) for shotgun shooting ranges is 1,200 feet – 900-foot ballistic range for the projectiles and a 300-foot buffer to allow for greater shot distances due to wind or topography (R.1, ¶20). The NRA Range Source Book establishes safety standards for shooting ranges (R.78, p.6-8); Ohio law requires shooting ranges to substantially comply with those standards (OAC 1501:31-29-03). Range design that prevents projectiles from exiting the range property (termed "projectile containment") is vital to safety according to the NRA. In BZA hearings, defendants publicly acknowledged that shot enters our property. The State repeatedly authorized permits in the face of such

evidence and refused to consider revoking them. (R.1, ¶20-21, 49-52)

No protection from criminal acts

We appealed the BZA approval and the shooting was temporarily stayed after operating for over a year. While operating, Mike Loriz witnessed patrons shooting toward the Loriz property and heard shots hit the trees above his head. Shot trespass violates criminal statutes including *ORC §2923.16. Discharge of firearm on or near prohibited premises*[9]. A sheriff's deputy declined to press charges, reporting it as a civil matter. During the stay, the Shooters were videotaped shooting into our property at the direction of attorney/judge Connaughton. Later, Detective Schultheiss opened a *criminal* investigation of the videotaped incident but was overtly obstructed by Mr. Gates, the county's chief *civil* attorney and BZA attorney in the administrative appeal. (R.1, ¶23,47-48)

Mike Loriz attempted to press criminal charges. The County magistrate (Mr. Turner) refused to process any criminal charges against any person shooting from the Keller property, ever, regardless of the evidence. Defendants and a range patron (named in the amended complaint) attempted to prosecute Mike Loriz twice for disorderly conduct; all charges were

[9] See R.48, p.13 for a more complete list of laws the Shooters violate.

dismissed but at great emotional and financial cost. (R.1, ¶43-45)

Loriz attorneys #2 & #3 pursued the BZA appeal but one attorney said he lost clients whose cases were in Judge Connaughton's court. (R.34 affidavit)

The last tree harvested before abandoning the property, a large walnut tree located 250' from our house, was impregnated with lead shot. It was relegated to the firewood pile. Other trees showed signs of shot damage. Lead shot was entering the Loriz property with enough force to embed in wood. (R.1, ¶54)

Appeals do not address shot trespass

The trial court upheld the zoning decision. We appealed the ruling to the 12th Appellate Court (represented by attorneys #4, 5, and 6). That appeal addressed only whether Mr. Connaughton's evidentiary testimony, as an attorney, was admissible and whether the trial court's upholding of the BZA decision was reasonable. It did not address legality or constitutionality of the permit. The Judges *sua sponte* aired the issue of shot distance that penetrates 800 feet into our property. The Judges affirmed the ruling without addressing shot trespass and shooting resumed. (R.1, ¶33-42)

In addition to appealing the BZA permit, the Loriz family sought enforcement of state shooting range laws and sent evidence of shot trespass to the

State. Chief Gray personally responded but refused to act, noting that we had once named the state in a civil suit. (R.1, ¶49-53)

The Loriz family flees

Reforestation efforts – 1,300 trees, protective tubes and stakes funded in part by the State of Ohio – were abandoned and the seedlings perished. A pass through the mature timberstand with a metal detector indicated many contaminated, now worthless, trees. Attempts to sell the property failed. Attempts to subdivide were denied by the BZA, in part on grounds that the property was degraded by the shooting range it approved. (R.1, ¶54, 24)

The Loriz family abandoned the Ohio property, June 2003, and relocated to a 900 square-feet house in New York at significant financial, professional and emotional cost. (R.1, ¶58)

Forced removal from a public hearing and shooting operations expand

The BZA conducted its first "annual" review of the shooting range in April 2004, nearly three years after its original approval. As Mike Loriz prepared to explain the hazards of lead in shotgun shells he brought as evidence, BZA member Bevington erupted, demanding that Mike Loriz be removed from the hearing. Mike cooperated, gathered his evidence and left the room where he was met by Deputy Compton.

She escorted him to the building's security center, confirmed that no infringement occurred and advised him to go back to the hearing. When Mike tried to re-enter the hearing, Mr. Bevington called security again and demanded Mike's ejection from the building. The BZA resumed the hearing, *sans* Mike, and expanded the shooting operations. (R.1 ¶53 and attachment)

The Butler County Prosecutor's Office was "not inclined" to investigate Mike's complaint that Mr. Bevington interfered with his civil rights (a crime under *ORC §2921.45*). (*Ibid*)

Mr. Keller constructed a large shooting tower and later placed a deer feeder between our house and the tower, intentionally directing lethal projectiles towards our home. (R.34, affidavit)

In December 2005, the Ohio courts dismissed County parties to the state suit leaving only private parties and the LLC as defendants. The case has yet to be heard. References to the Ohio civil case in the R&Rs (R.75, Background), as well as other facts, are in error as described in our Objections (R.83, p. 3-5).

* * *

Rooker-Feldman* dismissals since *Exxon Mobil

Derived by searching Lexis for *Rooker-Feldman* dismissals in each circuit since March 30, 2005, the date of the *Exxon Mobil v. Saudi Basic Industry Corp.* 544 U.S. 280 (2005) ruling and confirming a *Rooker-Feldman* dismissal in part or in whole for each case.

First Circuit

Davison v. Gov't of P.R.-P.R. Firefighters Corps 471 F.3d 220 (2006)
Adames v. Fagundo, 198 Fed. Appx. 20 (2006)
Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17 (2005)
Heghmann v. Indorf, 324 B.R. 415 (2005)
4 (1 unreported)

Second Circuit

Mennella v. Carey, 2007 U.S. App. LEXIS 25829
Saferstein v. Lawyers' Fund for Client Protection, 223 Fed. Appx. 39
Garvin v. Bank of N.Y., 227 Fed. Appx. 7 (2007)
Edem v. Spitzer, 204 Fed. Appx. 95 (2006)
Neshewat v. Salem, 194 Fed. Appx. 24 (2006)
Bueno v. Hurd, 175 Fed. Appx. 486 (2006)
Sadowski v. Falanga, 170 Fed. Appx. 774 (2006)
Coleman v. Pataki, 170 Fed. Appx. 145 (2006)
King v. Connecticut, 158 Fed. Appx. 350 (2005)
Swiatkowski v. New York, 160 Fed. Appx. 30 (2005)
Catanzaro v. Wallenstein, 142 Fed. Appx. 540 (2005)
Conway v. Garvey, 135 Fed. Appx. 485 (2005)
Grumbkow v. Greenpoint Bank, 132 Fed. Appx. 913 (2005)
Ally v. Sukkar, 128 Fed. Appx. 194 (2005)
14 (all 14 unreported)

Third Circuit

Nixon v. Tioga County Family Servs., 2007 U.S. App. LEXIS 23317

McKnight v. Baker, 2007 U.S. App. LEXIS 14783

Tillio v. Radnor Police, 236 Fed. Appx. 794 (2007)

Kwasnik v. Leblon, 228 Fed. Appx. 238 (2007)

O'Callaghan v. Harvey, 233 Fed. Appx. 181 (2007)

Ajjahnon v. State, 2007 U.S. App. LEXIS 9314

Wise v. Carrafiello, 218 Fed. Appx. 180 (2007)

Acrivos v. Vaskov, 216 Fed. Appx. 224 (2007)

Murawski v. Baldwin, 209 Fed. Appx. 99 (2006)

Russo v. Glass Real Estate Co., 204 Fed. Appx. 157 (2006)

Korelis v. N.J. Judicial Officials in Court Process Action, 201 Fed. Appx. 870 (2006)

Denston v. Chapman, 200 Fed. Appx. 151 (2006)

Smith v. Dep't of Human Servs., 198 Fed. Appx. 227 (2006)

Bonham v. Givens, 197 Fed. Appx. 148 (2006)

Barnes v. Domitrovich, 184 Fed. Appx. 164 (2006)

Kehres v. Pa. Unemployment Comp. Bd. of Review, 182 Fed. Appx. 112 (2006)

Kepoint Preservaton Trust Org. v. Fisher, 173 Fed. Appx. 191 (2006)

Hawkins v. Supreme Court, 174 Fed. Appx. 683 (2006)

Kretchmar v. Bachtle, 161 Fed. Appx. 222 (2006)

DeSantis v. Franklin, 160 Fed. Appx. 237 (2005)

McKnight v. Hartford Ins. Co., 160 Fed. Appx. 220 (2005)

Walker v. Abraham, 156 Fed. Appx. 536 (2005)

Kliesh v. Bucks County Domestic Rels., 2005 U.S. App. LEXIS 23445

Ayres-Fountain v. E. Sav. Bank, 153 Fed. Appx. 91 (2005)

Earnest v. Ling, 140 Fed. Appx. 431 (2005)

Ash v. Redevelopment Auth., 143 Fed. Appx. 439 (2005)
Bolus v. Cappy, 141 Fed. Appx. 63 (2005)
Untracht v. Weimann, 141 Fed. Appx. 46 (2005)
Chajkowski v. Bosick, 132 Fed. Appx. 978 (2005)
Knapper v. Bankers Trust Co. (In re Knapper), 407 F.3d 573 (2005)
Johnson v. New Jersey, 134 Fed. Appx. 507 (2005)
Cambria County Children & Youth Servs. v. Lucas, 137 Fed. Appx. 448 (2005)
32 (31 unreported)

Fourth Circuit
Willner v. Frey, 2007 U.S. App. LEXIS 18514
Konan v. Sengel, 2007 U.S. App. LEXIS 16108
Motley v. Va. State Bar, 178 Fed. Appx. 191 (2006)
Jack v. Moore, 138 Fed. Appx. 526 (2005)
4 (all 4 unreported)

Fifth
Alden v. New Orleans Redevelopment Auth., 2007 U.S. App. LEXIS 24395
Wells v. Williams, 2007 U.S. App. LEXIS 18223
Fulton v. Texas, 217 Fed. Appx. 371 (2007)
Riley v. La. State Bar Ass'n, 214 Fed. Appx. 456 (2007)
Allen v. Nelms, 174 Fed. Appx. 823 (2006)
Armant v. West, 155 Fed. Appx. 130 (2005)
Sookma v. Millard, 151 Fed. Appx. 299 (2005)
Restitution Revival Church v. Waco Indep. Sch. Dist., 136 Fed. Appx. 702 (2005)
Zolbrod v. Tex. Dep't of Protective & Regulatory Serv., 137 Fed. Appx. 625 (2005)
Williams v. Liberty Mut. Ins. Co. 2005 U.S. App. LEXIS 566
10 (all 10 unreported)

Sixth Circuit:
Raymond v. Moyer, 501 F.3d 548 (2007)
Davis v. United States, 499 F.3d 590 (2007)
Loriz v. Connaughton, 233 Fed. Appx. 469 (2007)
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Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 455 Jurisdiction, powers, and temporary assignment

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> **(2)** Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

* * *

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

* * *

28 U.S.C. § 636 Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law –

* * *

(b)

(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, **except a motion for injunctive relief**, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. (emphasis added)

* * *

28 U.S. § 1257. State Courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

28 U.S.C. § 636 Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law –

* * *

(b)

(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, **except a motion for injunctive relief**, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. (emphasis added)

* * *

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(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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(2)

No. 07-759

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In The

Supreme Court of the United States

MICHAEL HANNING LORIZ
and CARA FRANCKE LORIZ,

Petitioners,

v.

JOHN B. CONNAUGHTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR REHEARING OF ORDER OF DENIAL OF WRIT OF CERITORARI

MICHAEL HANNING LORIZ
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OPINION AND JURISDICTION

This is a request for rehearing of Petition for Writ of Certiorari, S. Ct. 07-759, pursuant to Rule 44.2. The Order denying Certiorari was entered February 19, 2008.

REASONS FOR REHEARING THIS CASE

The denial of a writ of certiorari has left Petitioners Mike and Cara Loriz with no legal remedy to stop state-sanctioned shotgun fire from endangering their family and the public and from depriving them of their residential property. After finding merit to takings claims and lauding the Loriz family's abandonment of their property, the Sixth Circuit issued an irreconcilable dismissal with prejudice. The Petitioners have no recourse but to return to the property and defend against the gunfire pursuant to their Second Amendment rights.

Substantial grounds for granting the writ have yet to be reviewed by this Court. Only one panel of judges has reviewed the substance of this case, substance that is well represented by a National Rifle Association (NRA) technician report condemning the shooting range and a videotape of a county judge ordering range operators to shoot into the Loriz property during a court-ordered stay. Only the Sixth

Circuit injunction panel of fully vested justices[1] reviewed that evidence and ruled that this case had merit and should proceed.

NRA technician Jack Giordano inspected the Loriz property and, in consultation with shooting range designer Lorin Kramer, found the shooting range to be "in direct conflict with National Rifle Association's policy of Total Projectile Containment" (from Exhibit A, appellate injunction motion, July 13, 2006). "We believe that shot leaving the shooting preserve property is in direct conflict with Ohio Revised Code . . . " (*Ibid.*). Shooting into the property of another is a crime in Ohio (ORC 2923.16) and Ohio law further requires that shooting ranges substantially comply with NRA guidelines (1510:31-29-03(D)).

The strong NRA position on projectile containment and implications to Ohio law were absent from the *pro se* petition. The petition did not link the NRA-expert review to the injunction panel finding that

> Loriz has a likelihood of success on appeal. The court must ultimately decide whether this case is more analogous to *Williamson County Reg'l Planning Comm's v. Hamilton Bank*, 473 U.S. 172, 186 (1985), or *Montgomery v. Carter County*, 266 F. 3d 758, 766-768 (6th Cir. 2000). Loriz has not, however, shown irreparable harm. Loriz made the

[1] The Sixth Circuit's dispositive ruling was written by a visiting district court judge.

> laudable decision to move the family away from the danger posed by a stray hunter's bullet. Having moved the family away, Loriz now faces economic harm. Pet. App. 19-20.

The economic harm declared by the Sixth Circuit can never be compensated unless this Court grants a writ of certiorari in this case. A district court ruling that takings claims were unripe for *lack* of state proceedings was reversed by an appellate court ruling that those same takings claims had *already been heard* in state court. No regard was given to the injunction panel's declarations; there is no indication in the final disposition that the injunction ruling even existed.

Review of this case could establish that compliance with the NRA projectile containment policy is necessary to ensure that shooting ranges do not infringe on constitutional rights of adjacent property owners. Such a ruling would promote the interest of justice by limiting litigation against compliant shooting ranges.

Reconsideration is necessary to address a circuit court action of constitutional import that can only be resolved by this Court.

As presented in the petition, an oral argument was long scheduled for this case in the Sixth Circuit and journalized, twice, by court order (Pet. App. 15-17). That oral argument was cancelled by *ex parte* stipulation between the Respondents and the court; no written order followed.

Previously unnoticed, the final ruling of the Sixth Circuit did not cite a unanimous panel decision to forego oral argument, an argument established by the court's written orders. This failure to address *a court-ordered oral argument* defies Federal Rule of Appellate Procedure 34(a)(2) and raises serious due process questions.

Mike Loriz has been unintentionally and intentionally shot at by the patrons and operators of the range. When he returns to the property, as the Sixth Circuit disposition logically requires, he will enter the line of state gunfire again. He will have no laws to protect him: county prosecutors adamantly refuse to file civilian or law enforcement charges against anyone on the range. If he shoots back in defense, he *will* be prosecuted as he was (unsuccessfully but at great professional risk and personal cost) in 2001 and 2002.

The federal rulings below result in the criminalization of the Loriz family's secure use of their own property.

There are no state remedies in this case; there are no pending state court actions and no hidden jurisdictional bars. The only prior adjudication was a state-court administrative appeal of a neighbor's (the range property's) zoning permit, used by the Sixth Circuit to bar all Loriz claims arising before, during, after and independent of that administrative hearing pursuant to *Rooker-Feldman*. Such a dismissal with prejudice is unprecedented.

Petitioners are faced with the prospect of endlessly paying taxes on an unsellable, unsafe property. No one can enter the property without risk of injury, despite the defense suggestion that our children wear hunter orange vests when playing in the backyard.

Facing this risk, Loriz shall return to the property to clear the lead-embedded trees near the shooting range; access is needed to facilitate further video documentation of the shooting for the national media. Given the failure of government officials to prevent the gunfire danger (instead, they continue to permit it) or to prosecute criminal acts, Petitioner Mike Loriz shall defend himself against potentially lethal gunfire in accordance with the Second Amendment and common law.

Respondents host up to 35 shooters equipped with 12 gauge shotguns loaded with anything from number 8 shot to lead slugs. Petitioner will have a .22 caliber carbine and a .30 caliber rifle. Petitioner will let his presence be known. If shots are fired in his direction, they will be returned in kind.

Consistent with "red and tight" rules of engagement, Loriz will fire only if fired upon. The one exception is a repeat of a past offense: if a heavily armed man threatens a Loriz child on her play set. While Mike Loriz accepts the potential loss of his own life, he does not accept that for his daughters, who still have nightmares about shooters coming after them.

These are the unfortunate consequences of corrupt county and state authorities and federal courts

whose orders cannot be reconciled with each other or with the rule of law. Petitioners, denied both discovery and amendment of their complaint, have not had a single day in court. Attorney after attorney and judge after judge has defended or condoned rural "sportsmen" shooting the daylights out of our property but consider the suggestion of an identical operation in their neighborhoods to be a criminal threat. Every federal court below has recognized that our property has been taken by shotgun fire but each has deprived us of any relief. An American family has been shot off its property by the state and barred from all legal recourse.

As a humble instrument of the Court, Loriz shall, without malice, return to his property and risk his life to defend his fundamental Constitutional rights.[2] As the legal owner and taxpayer of that property, Loriz asserts the right to walk on it. If the act of walking on the property results in a state-sanctioned, court-condoned bloodbath, so be it. Such an outcome is an inevitable consequence of the Sixth Circuit ruling, should it stand.

---

[2] After nearly losing his own life in a Navy F-18 and watching comrades die in defense of the Constitution, Petitioner notes the irony that he may now lose his life because the federal courts will not uphold that same Constitution.

CONCLUSION

After reconsideration, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CARA FRANCKE LORIZ
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MARCH 2008

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

_____

Michael Hanning Loriz